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ENGINEERING LAW

VOLUME I

THE LAW OF CONTRACT

BY

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FIRST EDITION

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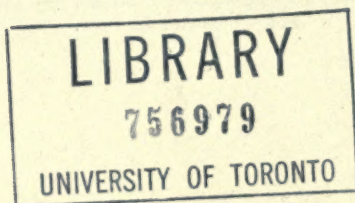
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PREFACE

This book is intended for the use of engineers and engineering students. The purpose is to present a condensed text of the law of contract: to give the general theory of the subject as taught in schools of law, while yet avoiding the reading of endless cases. Following the various rules in the order given, it is hoped that the student will get an understanding of the subject sufficient to guide him in meeting the legal phases of whatever branch of engineering may engage him.

It is the author's belief that the case system of teaching law is not the best for the engineer. On the other hand, the text-book method taken alone does not enable the student to understand fully how the courts work out the rules of law in connection with the concrete facts. A combination of the two methods judiciously arranged by the instructor seems better adapted to provide the student with a knowledge of this important subject than is the present meager lecture system. To this end the rules of law in each chapter are followed by cases from practice, in many instances involving situations closely allied to engineering and intended to illustrate the application of the rules previously learned. Brief extracts from opinions in cases of a strictly engineering nature are given at the end of each section for the purpose of further illustration.

The law of contract as presented to the majority of engineering schools at the present time consists of half a dozen lectures delivered by an attorney, who, aside from these lectures, does no further lecturing or teaching. The result is what might be expected: the engineering student graduates with practically no knowledge of the subject. This text is intended for use as a recitation course, to be supplemented by an occasional lecture by the instructor, and to be given by an experienced professor of engineering.

The author is indebted to Dean Clarence D. Ashley of New York University Law School for matter on Conditions in Contract, and to Samuel Williston, Professor of Law, Harvard University, for the privilege of using a number of cases from his Case-book on Contracts. Acknowledgment is also made to John C. Wait, author of *The Law of Contracts*, for various excerpts from engineering decisions.

A. H.

New York, January, 1910.

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THE LAW OF CONTRACT

ENGINEERING LAW

VOLUME I

THE LAW OF CONTRACT

CHAPTER I

THE CONTRACT: ITS INHERENT ELEMENTS

An investigation of the law of contract naturally divides itself into five parts:

1. The meaning of the term: what a contract really is.
2. The construction of the contract: the components of a valid contract.
3. The parties affected: those whom it may affect primarily or whom it may be made to affect by means of a transfer.
4. The fulfillment of the terms specified or implied: the performance of the contract.
5. The termination of the contractual liability: the discharge.

What is a contract? No exact definition is attempted nor has one been found which is entirely satisfactory. All of the definitions by the acknowledged authorities, however, express the idea with sufficient exactitude to fit most cases. Thus we find a contract defined as:

A deliberate engagement between competent parties upon a legal consideration to do or to abstain from doing some act. Story, Contr. §1.

An agreement upon sufficient consideration to do or not to do a particular thing. 2 Bla. Com. 446; 1 Kent 449.

An agreement enforceable at law, made between two or more persons, by which rights are acquired by one or both to acts or forbearances on the part of the other or others. Anson, Contr. 9.

In these definitions the word agreement needs defining as well as contract; the consideration, which is essential to the validity of some classes of contracts, really forms no part of the idea; moreover, the conception of mutuality which distinguishes a contract from a promise is not made sufficiently prominent.

Of the various classes of contracts the following are the most important:

Executed contracts: those in which nothing remains to be done by either party, where the transaction is complete at the time the contract is made: as the sale of an article, delivery and payment being simultaneous.

Executory contracts: those in which some act remains to be done: as when an agreement is made to build a bridge, house, etc., in one year from date.

Contracts of record: those which are entered into by the intervention of some public authority, and are evidenced by matter of record, such as a judgment.

Severable contracts: those the considerations of which may be divided or apportioned on either side, so as to correspond with the several parts of the consideration on the other side.

Simple or parol contracts: all those which are not contracts of record or specialties. They constitute the lowest class of contracts.

Specialties: contracts which are under seal; as bonds and deeds or writings sealed and delivered, which are given as security for the payment of a debt, and in which such debt is particularly specified.

Unilateral contracts: those which call for an act, not a counter-promise, and in which the party to whom the promise is made enters upon no express agreement.

Bilateral contracts: those in which both parties make promises, as, for instance: A promises to buy certain goods, when made, at a fixed price, and B promises to manufacture the goods and sell them to A at the specified price.

Quasi-contracts: those in which the law imposed an obligation, where the defendant did not intend to assume one; they are founded upon the doctrine that no one shall be allowed to enrich himself unjustly at the expense of another.

AGREEMENT.

In a contract there are two inseparable ideas, agreement and obligation. The agreement creates the contractual obligation. We may have agreement of a certain kind in the minds of the parties,

but if it does not contemplate bringing into existence a contractual obligation of one party to the other, it is not the agreement which makes a contract.

Characteristics.

1. There must be the intent to contract in the minds of both parties.¹ To illustrate:

Jones says to Smith, "My house needs painting."

Smith says to Jones, "I think so, too."

There is perfect agreement of the two minds, but no intention to contract.

Brown in speaking to Green says, "Will you dig this cellar for \$50?"

Green replies, "I will."

Here there is both agreement and the necessary intention to form a contract.

2. There must be the communication of this intent from each party to the other. Thus a mental note, unexpressed in any way, that one party agrees to the other's proposition, will not create a binding agreement.² Thinking assent is not sufficient.

3. There must be two or more parties. A man cannot agree with himself: there must be at least two minds. A person cannot contract with himself nor maintain an action against himself.³

4. The parties must have in mind a legal relationship as contrasted with one of a social nature.⁴

To sum up, contract is that particular sort of agreement which contemplates the formation of an obligation between the parties.

OBLIGATION.

Obligation is a legal bond whereby constraint is laid upon a person or group of persons to act or forbear to act on behalf of another person or group. Anson, Contr. 6.

¹ *Minneapolis &c. Ry. v. Columbus Rolling Mill*, 119 U. S. 149, H. & W. 74; *Rupley v. Daggett*, 74 Ill. 351.

² "A mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which, in itself, is no indication of an acceptance, become such, because accompanied by an unevinced mental determination." Folger, J., in *White v. Corlies*, 46 N. Y. 467, H. & W. 7.

³ *Eastman v. Wright*, 6 Pick. (Mass.) 316.

⁴ *Keller v. Holderman*, 11 Mich. 248, H. & W. 71; *McClurg v. Terry*, 21 N. J. Eq. 225, H. & W. 72.

Characteristics.

1. There is a control possessed by one or more persons over the acts of another.

2. This control must be definite and maintained only over special acts. A general control over the actions of another would affect his standing as a free man. It is a particular constraint which is agreed upon. If A contracts with B for his services for so many hours per day at a certain price, B's freedom is curtailed by the right of A to the service. A in turn is obliged to receive the service and pay for it.

3. Two persons at least are required, and those real.

4. The obligation must be one that can be measured in a pecuniary way.⁵ Disappointment occasioned by a person failing to perform a social duty, or gratitude due to an expression of kindness are not matters which can be given a money value. On the other hand, the damage due to the failure to complete a contract for the construction of a building is one that can be estimated in dollars and cents.

"Obligation then is a control exercisable by definite persons over definite persons for the purpose of definite acts or forbearances reducible to a money value." Anson, *Contr.* 8.

CASES

CHAPTER I.—ELEMENTS.

Every contract springs from the acceptance of an offer.

WHITE *v.* CORLIES.

46 NEW YORK, 467.—1871.

Appeal from judgment of the General Term of the first judicial district, affirming a judgment entered upon a verdict for plaintiff.

The action was for an alleged breach of contract. The plaintiff was a builder. The defendants were merchants. In September, 1865, the defendants furnished the plaintiff with specifications for fitting up a suit of offices at 57 Broadway, and requested him to make an estimate of the cost of doing the work. On September twenty-eighth the plaintiff left his estimate with the defend-

⁵ The parties may fix a pecuniary value to the doing or forbearing of an act which would otherwise not be reducible to a pecuniary standard; as the forbearing of a personal habit. *Hamer v. Sidway*, 124 N. Y. 538.

ants, and they were to consider upon it, and inform the plaintiff of their conclusions. On the same day the defendants made a change in their specifications and sent a copy of the same, so changed, to the plaintiff for his assent under his estimate, which he assented to by signing the same and returning it to the defendants. On the day following, the defendants' bookkeeper wrote the plaintiff the following note:

“NEW-YORK, September 29th.

“*Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date, you can begin at once.*

“The writer will call again, probably between five and six this P. M.

“W. H. R.,

“For J. W. CORLIES & Co., 32 Dey street.”

No reply to this note was ever made by the plaintiff; and on the next day the same was countermanded by a second note from the defendants.

Immediately on receipt of the note of September twenty-ninth, and before the countermand was forwarded, the plaintiff commenced a performance by the purchase of lumber and beginning work thereon. And after receiving the countermand, the plaintiff brought this action for damages for a breach of contract.

The court charged the jury as follows: “From the contents of this note which the plaintiff received, was it his duty to go down to Dey street (meaning to give notice of assent) before commencing the work? In my opinion it was not. He had a right to act upon this note and commence the job, *and that was a binding contract between the parties.*” To this defendants excepted.

FOLGER, J. We do not think that the jury found, or that the testimony shows, that there was any agreement between the parties, before the written communication of the defendants of September thirtieth was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound, in contract, to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work, as we understand the testimony, upon that stuff.

We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It

does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound, if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time communicated to him. Thus a letter received by mail containing a proposal, may be answered by letter by mail, containing the acceptance. And in general, as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand, the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which, in itself, is no indication of an acceptance, become such, because accompanied by an unevinced mental determination. Where the act uninterpreted by concurrent evidence of the mental purpose accompanying it, is as well referable to one state of acts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought formed but not uttered, or in his acts, that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff need not indicate to the defendants his acceptance of their offer; and that the purchase of stuff and working on it after receiving the note, made a binding contract between the parties. In this we think the learned judge fell into error.

The judgment appealed from must be reversed, and a new trial ordered, with costs to abide the event of the action.

All concur, but ALLEN, J., not voting.

Judgment reversed, and new trial ordered.

Acceptance must be absolute and identical with the terms of the offer.

MINNEAPOLIS AND ST. LOUIS RAILWAY v. COLUMBUS
ROLLING MILL.

119 UNITED STATES, 149.—1886.

MR. JUSTICE GRAY. The rules of law which govern this case are well settled. As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party; the one may decline to accept, or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiations, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it. *Eliason v. Henshaw*, 4 Wheat, 225; *Carr v. Duval*, 14 Pet. 77; *National Bank v. Hall*, 101 U. S. 43, 50; *Hyde v. Wrench*, 3 Beavan, 334; *Fox v. Turner*, 1 Bradwell, 153. If the offer does not limit the time for its acceptance, it must be accepted within a reasonable time. If it does, it may, at any time within the limit and so long as it remains open, be accepted or rejected by the party to whom, or be withdrawn by the party by whom, it was made. *Boston & Maine Railroad v. Bartlett*, 3 Cush. 224; *Dickinson v. Dodds*, 2 Ch. D. 463.

The defendant, by the letter of December 8, offered to sell to the plaintiff two thousand to five thousand tons of iron rails on certain terms specified, and added that if the offer was accepted the defendant would expect to be notified prior to December 20. This offer, while it remained open, without having been rejected by the plaintiff or revoked by the defendant, would authorize the plaintiff to take at his election any number of tons not less than two thousand nor more than five thousand, on the terms specified. The offer, while unrevoked, might be accepted or rejected by the plaintiff at any time before December 20. Instead of accepting the offer made, the plaintiff, on December 16, by telegram and letter, referring to the defendant's letter of December 8, directed the defendant to

enter an order for twelve hundred tons on the same terms. The mention, in both telegram and letter, of the date and the terms of the defendant's original offer, shows that the plaintiff's order was not an independent proposal, but an answer to the defendant's offer, a qualified acceptance of that offer, varying the number of tons, and therefore in law a rejection of the offer. On December 18, the defendant by telegram declined to fulfill the plaintiff's order. The negotiation between the parties was thus closed, and the plaintiff could not afterwards fall back on the defendant's original offer. The plaintiff's attempt to do so, by the telegram of December 19, was therefore ineffectual and created no rights against the defendant.

Such being the legal effect of what passed in writing between the parties, it is unnecessary to consider whether, upon a fair interpretation of the instructions of the court, the question whether the plaintiff's telegram and letter of December 16 constituted a rejection of the defendant's offer of December 8 was ruled in favor of the defendant as matter of law, or was submitted to the jury as a question of fact. The submission of a question of law to the jury is no ground of exception if they decide it aright. *Pence v. Langdon*, 99 U. S. 578.

Judgment affirmed.⁶

The offer must be intended to create, and capable of creating, legal relations.

KELLER *v.* HOLDERMAN.

11 MICHIGAN, 248.—1863.

Action on a three-hundred-dollar check which had been drawn by defendant in favor of plaintiff, on a bank which had refused to honor it. The facts concerning the check were, that it was given for a fifteen-dollar watch, which defendant kept until the day of trial, when he offered to return it, but plaintiff refused to receive it; that the whole transaction was a frolic and banter, the plaintiff not expecting to sell nor the defendant intending to buy the watch at the sum for which the check was drawn; and that the defendant when he drew the check had no money in the banker's hands, and had intended to insert a condition in the check that would prevent

⁶ See also *Macley v. Harvey*, 90 Ill. 525; *Fitch v. Snedaker*, 38 N. Y. 248.

his being liable upon it, but had failed to do so. Judgment was rendered against him for the amount of the check, whereupon he appealed.

MARTIN, C. J. When the court below found as a fact that "the whole transaction between parties was a frolic and a banter, the plaintiff not expecting to sell nor the defendant intending to buy the watch at the sum for which the check was drawn," the conclusion should have been that no contract was ever made by the parties, and the finding should have been that no cause of action existed upon the check to the plaintiff.

The judgment is reversed, with costs of this court and of the court below.

The other Justices concurred.

McCLURG *v.* TERRY.

21 NEW JERSEY EQUITY, 225.—1870.

THE CHANCELLOR. The complainant seeks to have the ceremony of marriage performed between herself and the defendant in November, 1869, declared to be a nullity. The ground on which she asks this decree is, that although the ceremony was actually performed, and by a justice of the peace of the county, it was only in jest, and not intended to be a contract of marriage, and that it was so understood at the time by both parties, and the other persons present; and that both parties have ever since so considered and treated it, and have never lived together, or acted towards each other as man and wife. The bill and answer both state these as the facts of the case, and that neither party intended it as a marriage, or was willing to take the other as husband or wife. These statements are corroborated by the witnesses present. The complainant is an infant of nineteen years, and had returned late in the evening to Jersey City, from an excursion with the defendant and a number of young friends, among whom was a justice of the peace, and all being in good spirits, excited by the excursion, she in jest challenged the defendant to be married to her on the spot; he in the same spirit accepted the challenge, and the justice at their request performed the ceremony, they making the proper responses. The ceremony was in the usual and proper form, the justice doubting

whether it was in earnest or in jest. The defendant escorted the complainant to her home, and left her there as usual on occasions of such excursions; both acted and treated the matter as if no ceremony had taken place. After some time the friends of the complainant having heard of the ceremony, and that it had been formally and properly performed before the proper magistrate, raised the question and entertained doubts whether it was not a legal marriage; and the justice meditated returning a certificate of the marriage to be recorded before the proper officer. The bill seeks to have the marriage declared a nullity, and to restrain the justice certifying it for record.

Mere words without any intention corresponding to them, will not make a marriage or any other civil contract. But the words are the evidence of such intention, and if once exchanged, it must be clearly shown that both parties intended and understood that they were not to have effect. In this case the evidence is clear that no marriage was intended by either party; that it was a mere jest got up in the exuberance of spirits to amuse the company and themselves. If this is so, there was no marriage. On this part of the case I have no difficulty.

* * * * *

I am satisfied that this court has the power, and that this is a proper case to declare this marriage a nullity.

ENGINEERING CASES: EXCERPTS FROM DECISIONS of APPLIED MECHANICS

MUTUAL ASSENT.

An error of a material nature such as in the kind, quantity or price of the subject matter may make the contract void because there was never any real consent. *Gibson v. Pelhie*, 37 Mich. 380.

A telegraph operator by an error made an order for three rifles to read as fifty rifles. There was held to be no contract. *Henkle v. Pape*. L. R. 6 Ex. 7.

A watchman agreed to work for one dollar and a half per day, and nights the same. The employer understood the rate to be one dollar and a half per day, of twenty-four hours, while the watchman meant the price per day of twelve hours. It was held to be no contract, for the parties did not assent to the same thing; the watchman having rendered the service was allowed to recover what

it was reasonably worth. *Turner v. Webster*, 24 Kan. 38 (1880); *Tucker v. Preston* (Vt.), 11 Atl. Rep. 726 (1888); *Vogel v. Pekoe* (Ill. Sup.), 42 N. E. Rep. 386.

A memorandum of employment was to the effect that a certain person was to be engaged "for the season 1890-1891 at a salary of \$75 per week, subject to the regulations and conditions of a contract to be substituted for the memorandum." Held: no contract, because of no meeting of the minds as to the conditions and regulations specified in the later writing. *Walton v. Mather*, 24 N. Y. Supp. 307.

At the time of making the contract, if the owner or contractor acts in a manner which would lead a reasonable man to believe that he understands and assents to it, then later neither party can assert that he did not understand. *Phillip v. Gallant*, 62 N. Y. 256.

Negotiations may be followed by a written memorandum, but it is not a contract until finally signed, even though it may be read by both parties. *Sanders v. Pottlitzer Bros.* F. C. (N. Y. App.), 39 N. E. Rep. 75.

PLEASE RETURN TO
DEPT. of APPLIED MECHANICS.

CHAPTER II

THE CONTRACT: ITS FORMATION

An analysis of a valid contract and one enforceable at law, shows it to be made up of the following elements:

1. A communication by one party to the other and the reply: the offer and its acceptance.
2. The evidence of the intent to contract in the form of a consideration.
3. The necessary writing, wherever it is required by the Statute of Frauds.
4. The capacity of the parties to create a valid contract.
5. The legality of the subject-matter.

If all of these elements are present the contract is *valid*. If one is missing the contract may be *unenforceable*, or *voidable*, or *void*.

SECTION I.

MUTUALITY.

(a) Offer.

Every promise involves two parties: a promisor who makes the promise, and a promisee to whom the promise is made. A promise set forth in the form of a proposition is an *offer* and according to the rules of law, it does not exist as such until it is communicated to the person to whom it is made. Negotiations leading to the agreement may be quite extensive and involved, but ultimately they may all be reduced to the simple question, "Will you do thus and so?" and the answer "I will."

The presence in a station of a train ready to start is a standing offer, while it is there, of the railroad company to the public, of transportation to the specified destination; they offer an act—to carry the person—for a promise on the part of the person who boards the train to pay for such transportation. This may be called a unilateral contract, an act given for a promise.

A property owner who has his lands injured by a vandal offers through an advertisement a reward for his capture: he offers a promise—the payment of the reward—for an act—the capture. When the act is performed the money is due. The contract is unilateral.

A manufacturer offers a salesman a certain sum on a future date if he will promise to serve him until that date. When the salesman promises to serve, he accepts the promise of employment and remuneration. There is a promise given for a promise; the contract is bilateral.

Some of the more important rules of law regarding offers are as follows:

1. A offers a promise for an act. If B, without knowing of the offer, does the act, he cannot claim the promise of the offer.¹

2. Preliminary negotiation is not necessarily an offer. The bargaining back and forth may ultimately lead to the offer and its acceptance.

3. An offer must be made in the form of a proposal to become binding upon acceptance.²

4. An offer is made where the offeree learns of it: at the place where it is communicated to his mind.

5. An offer remains open for acceptance during the period of time specified by the offeror or, in the absence of any specified time, a reasonable length of time under the circumstances. During this time it is considered as a continuing offer.³

6. When the offer calls for an act, secret in its nature, then the offeror must be notified when the act is performed.⁴

7. The offer must show the intention of the offeror to create or change a legal relationship between the parties.⁵ An offer made and accepted in jest is not binding, nor is a social engagement arranged between friends, for in these cases no legal status is contemplated for the act.

8. An offer need not be made to an ascertained person, but no contract arises until it is accepted by an ascertained person.⁶

¹ *Fitch v. Snedaker*, 38 N. Y. 248; *Howland v. Lounds*, 51 N. Y. 604; *Vitty v. Eley*, 51 N. Y. App. Div. 44.

² *Rooke v. Dawson* (1895) 1 Ch. 480; *Neidermeyer v. Univ. of Missouri*, 61 Mo. App. 654.

³ *Adams v. Lindsell*, 1 Barn. & Ald., 681.

⁴ *In re London and Northern Bank*, 1 Ch. R. 220.

⁵ *McClurg v. Terry*, 21 N. J. Eq. 225; *Keller v. Holderman*, 11 Mich. 248.

⁶ *Williams v. Carwardine*, 4 Barn. & Ald. 621.

(b) Acceptance.

Acceptance is the receipt of a thing offered by another with the intention of retaining it, indicated by some act sufficient for the purpose. 2 Parsons Contr. 221. Two elements must be present to constitute an acceptance: a receipt and an intention to retain. The leading rulings follow:

1. If A asks B to work for him, B may accept by doing the work, unless A has specified some other mode of acceptance.

2. If A does work for B without B's request and B permits him to do it, the doing of the work is the offer, and the permission to do it is the acceptance.⁷ Also, if A sends goods to B's shop, and B accepts or uses them, he will be liable on an implied contract to pay their market value. Sending the goods is the offer, using them is the acceptance.⁸

3. Acceptance as such, does not require communication. It implies more than mental assent; it must be conveyed by some overt act.⁹

4. An offer becomes a promise when it is accepted;¹⁰ till then neither party is bound. After acceptance it is irrevocable, except upon mutual rescission.

5. The offeror cannot do away with the acceptance, by saying "If I do not hear from you, I'll consider it an acceptance." Silence does not constitute an acceptance. A person cannot be compelled by his silence to accept an offer.¹¹

6. Where the document delivered purports to be, or would by a reasonable man be understood to be, a contract, and not a mere check or voucher, its acceptance is an acceptance of all the terms and stipulations contained in it.¹² On the other hand, the acceptor will not be bound by any other terms intended to be included in it.

⁷ *Day v. Caton*, 119 Mass. 513; *Curry v. Curry*, 114 Pa. St. 367; *Hertzog v. Hertzog*, 29 Pa. St. 465; *Cicotte v. Church of St. Anne*, 60 Mich. 552.

⁸ *Indiana Mfg. Co. v. Hayes*, 155 Pa. St. 160; *Hobbs v. Massasoit Whip Co.*, 158 Mass. 194.

⁹ *Wheat v. Cross*, 31 Md. 99.

¹⁰ *Muller v. McKenzie*, 95 N. Y. 579; *Goward v. Waters*, 98 Mass. 598; *Kinder v. Brink*, 82 Ill. 376.

¹¹ *Bartholomew v. Jackson*, 20 Johns (N. Y.) 28; *James v. O'Driscoll*, 2 Bay (S. C.) 101; *Thornton v. Village of Sturgis*, 38 Mich. 639; *Royal Ins. Co. v. Beatty*, 119 Pa. St. 6.

¹² *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553; *Zimmer v. N. Y. C. & R.*, 137 N. Y. 460; *Ballou v. Earle*, 17 R. I. 441; *Boylan v. Hot Springs R.*, 132 U. S. 146.

7. The acceptance must conform to the terms of the offer and be absolute.¹³ If the offeree changes the terms of the offer, it is not an acceptance, but a counter-proposal,¹⁴ and it terminates the original offer.¹⁵

Considerable difficulty may arise on this point, in cases where a contract is finally made after long correspondence or negotiation. If the original offer is finally accepted, it does not create a contract, but is a new counter-offer which the original offeror may accept or reject.¹⁶

8. The general rule in the United States is that the reply becomes an acceptance when the letter is mailed or telegram dispatched, even though the letter or telegram of acceptance is never received.¹⁷ This rule holds, although in the meantime the offeror has mailed another letter revoking the offer.¹⁸ The rule in Massachusetts is *contra*, that is, the acceptance does not become effective until the offeror receives it.¹⁹

In *Henthorn v. Fraser*, Lord Herschell said: "I should prefer to state the rule thus: where the circumstances are such that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."

Since acceptance concludes the contract, if it be made by mail, a telegram sent later will not revoke it though received before the letter. An offer made by mail should be accepted in the same manner.

¹³ *Eggleston v. Wagner*, 46 Mich. 610, 620; *Hussey v. Horne-Payne*, 8 Ch. D. 670; *Corcoran v. White*, 117 Ill. 118; *Hough v. Brown*, 19 N. Y. 111; *Brown v. R. R. Co.*, 44 N. Y. 79.

¹⁴ *Slaymaker v. Irwin*, 4 Whart. 369, 380; *Esmay v. Groton*, 18 Ill. 483; *MacLay v. Harvey*, 90 Ill. 525; *Nat. Bank v. Hall*, 101 U. S. 43, 50; *Smith v. Wetherell*, 4 Ill. App. 655.

¹⁵ *Jones v. Daniel*, 1894, 2 Ch. 332; *Baker v. Holt*, 56 Wis. 100; *Fenno v. Weston*, 31 Vt. 345; *Minneapolis, &c. Ry. v. Columbus Rolling Mill*, 119 U. S. 149; *Weaver v. Burr*, 31 W. Va. 736; *Kirwin v. Byrne* (Com. Pl.), 29 N. Y. Supp. 287; N. Y. Supp. 143, affirmed; *Lawrence v. Milwaukee, Etc. R. Co.* (Wis.), 54 N. W. Rep. 797; *Hyde v. Wrench*, 3 Beavan 334.

¹⁶ *Sheffield C. Co. v. Sheffield & R. Ry. Co.*, 3 Ry. & C. Cas. 121; *Fox v. Turner*, 1 Ill. App. 153, 159.

¹⁷ *Household Ins. Co. v. Grant*, 4 Ex. D. 216; *Vassar v. Camp*, 11 N. Y. 441; *Howard v. Daly*, 61 N. Y. 362; *Washburn v. Fletcher*, 42 Wis. 152.

¹⁸ *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Stevenson v. McLean*, 5 Q. B. D. 346; *Wheat v. Cross*, 31 Md. 99.

¹⁹ *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278.

9. If the offeror specifies a particular mode of acceptance, he takes the risks of all of the uncertainties of that method.²⁰ If the mail, then the risks of the mail; if the telegraph, then the uncertainty of that.

(c) *Termination.*

Revocation or recall is an act of the offeror by which he communicates his change of purpose and withdraws from the offeree the right he had given him to complete the contract by acceptance.

"Acceptance is to offer, what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone. But the powder may have lain till it has become damp, or the man who laid the train may remove it before the match is applied. So an offer may lapse for want of acceptance, or be revoked before acceptance." Anson, *Contr.* 32.

These rules apply to the duration or termination of offers:

1. Revocation must be communicated to the offeree, not simply mailed as in the case of acceptance, but brought to the knowledge of the offeree.²¹

An exception exists in the case of offers of rewards by advertisement. Such offers may be revoked by advertisement and the revocation is effective whether brought to the notice of the acceptor or not.²²

2. An offer is revoked when an interference with the continuance of the offer on the part of the offeror comes to the knowledge of the offeree.

3. The rejection of an offer on the part of the offeree ends it. He must communicate his rejection to the offeror to have it effective.

4. If the mode of acceptance is express and the offeree replies by some other method, the offeror may treat the acceptance as void. Not so if he suggests or merely intimates a mode of acceptance; in such case if the offeree uses ordinary means of communication and

²⁰ *Taylor v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390; *Patrick v. Bowman*, 149 U. S. 411; *Mactier v. Frith*, 6 Wend. (N. Y.) 103; *Fassar v. Camp*, 11 N. Y. 411; *Perry v. Mount Hope Iron Co.*, 15 R. I. 380.

²¹ *Byrne v. Van Tienhoven*, 5 Com. P. Div. 344; *Sherwin v. Nat. C. R. Co.* (Colo. App.), 38 Pac. Rep. 392; *Henthorn v. Fraser*, 2 Chancery 27; *Langdell's Summary*, 1090.

²² *Shucy v. United States*, 92 U. S. 73.

causes no delay the acceptance is valid. Substituting other terms ends the offer, and amounts to a counter-proposal.²³

5. Ordinarily an offer not under seal may be revoked or withdrawn at any time before acceptance,²⁴ even though the offeror has specified the length of time it is to run.²⁵ After acceptance it is irrevocable;²⁶ it is necessary then that the parties rescind by agreement which practically amounts to forming a new contract not to carry out the former one.²⁷

6. An offer may be revoked up to the time of completion of the performance of consideration. It does not become irrevocable when the performance of the consideration has been begun.

7. An offer terminates when its period of life expires.²⁸

8. An offer may lapse or die if it is not accepted before a reasonable length of time expires.²⁹

9. The death of either party puts an end to the offer.³⁰ The personal representative of the offeree cannot be held by the offer nor can he hold the offeror.³¹

10. The insanity of either party terminates the offer.³²

²³ *Minneapolis, &c. Ry. v. Columbus Rolling Mill*, 119 U. S. 149; *Weaver v. Burr*, 31 W. Va. 736.

²⁴ *Larmon v. Jordon*, 56 Ill. 206; *School Directors v. Trefethren*, 10 Ill. App. 127; *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 49.

²⁵ "A limitation of time for which a standing offer is to run is equivalent to the withdrawal of the offer at the end of the time named." *Longworth v. Mitchell*, 26 Oh. St. 334, 342.

²⁶ *White v. Corlies*, 46 N. Y. 467; *Fisher v. Seltzer*, 23 Pa. St. 308; *Boston & Maine Ry. v. Bartlett*, 3 Cush. (Mass.) 224; *Houghwout v. Boisabuin*, 18 N. J. Eq. 315.

²⁷ *Foster v. Dabber*, 6 Ex. Ch. 851.

²⁸ *Longworth v. Mitchell*, 26 Oh. St. 334, 342; *Maclay v. Harvey*, 90 Ill. 525; *Potts v. Whitehead*, 20 N. J. Eq. 55, 59.

²⁹ *Minnesota Oil Co. v. Collier &c.*, 4 Dillon (U. S. C. C.) 431; *Loring v. Boston*, 7 Met. (Mass.) 409; *Wheat v. Cross*, 31 Md. 99; *Maclay v. Harvey*, 90 Ill. 525.

³⁰ *Helpenstein's Est.*, 77 Pa. St. 328; *Wallace v. Townsend*, 43 Ohio St. 537; *Sutherland v. Parkins*, 75 Ill. 338, 341.

³¹ *Pratt v. Trustees*, 93 Ill. 475; *Twenty-third Street Baptist Church v. Cornell*, 117 N. Y. 601.

³² *Beach & First M. E. Church*, 96 Ill. 177.

CASES

CHAPTER II.—FORMATION. SECTION I.—MUTUALITY.

A contract may arise by words or conduct.**EDGE MOOR BRIDGE WORKS v. COUNTY OF BRISTOL**
SUPREME JUDICIAL COURT OF MASSACHUSETTS,
MARCH 3-28, 1898.*(Reported in 170 Massachusetts, 528.)*

Contract. The declaration alleged that, under the provisions of St. 1893, c. 368, and of various acts in amendment thereof and in addition thereto, the county commissioners of Bristol were authorized and directed to widen the bridge between New Bedford and Fairhaven within the county of Bristol, and were authorized and empowered to reconstruct the existing bridge, or to construct a new bridge; and it was further provided that the expense of the construction should in the first instance be borne by the county; and that, acting under the authority so conferred, the commissioners inserted in several newspapers published in the county and elsewhere two advertisements, the material provisions of which were as follows:—

“Sealed proposals addressed to the County Commissioners of Bristol County, and indorsed ‘Proposals for building the substructure of the middle portion of the New Bedford and Fairhaven Bridge,’ and ‘Proposals for building the superstructure of the middle portion of the New Bedford and Fairhaven Bridge,’ will be received by the County Commissioners of Bristol County at New Bedford, Mass., until 2:30 o’clock P. M., of the 2d day of August, 1897, and at that time will be publicly opened and read at the court house, New Bedford.

“Each bidder will be required to present a certified check upon a National Bank for \$5,000, payable to Treasurer of Bristol County, twenty-four (24) hours before the date and hour above fixed for opening the proposals, said check to be returned to the bidder unless he fails to execute the contract should it be awarded to him.

“An agreement for five thousand dollars (\$5,000) liquidated damages will be required for the faithful performance of the contract, with sureties to be residents of or qualified to do business

in the State of Massachusetts and satisfactory to said county commissioners.

"The person or persons to whom the contract may be awarded will be required to appear at the court house, New Bedford, with the agreement and sureties offered by them, and execute the contract within six days (not including Sunday) from the date of notification of such award, and the preparation and readiness for signature of the contract; and in case of failure or neglect so to do, he or they will be considered as having abandoned it, and the check accompanying the proposal shall be forfeited to the County of Bristol.

"All bids must be made upon the blank forms furnished by the engineer. Prices must be given in writing and in figures for each material or division of the construction enumerated, which prices are to include and cover the furnishings of all the materials and the performance of all the labor requisite or proper for the purpose, in the manner set forth, described, and shown in the specifications and on the plans for the work and in the form of contract approved by the counsel for the commissioners."

The declaration further alleged that, in accordance with the advertisements, and relying upon the terms and conditions thereof, the plaintiff delivered to the commissioners prior to the time named therein sealed proposals for building the substructure and superstructure of the middle portion of the New Bedford and Fairhaven Bridge, which proposals were upon printed forms furnished by the engineer of the commissioners; that the plaintiff presented to the commissioners previously to the day so named two certified checks upon national banks for \$5,000 each, in accordance with the terms and provisions of the advertisements above mentioned; that the plaintiff did everything required of it under the terms of the advertisements to entitle it to the award of the contracts named therein; that thereafter, at a meeting of the commissioners held on August 13, 1897, at which all three of the commissioners were present, a vote was duly passed and entered upon the records of the commissioners, the material part of which was as follows: "Voted, That the cumulative bid of Edge Moor Bridge Works is accepted, and that the contract thereon be awarded to said party"; that a copy of the vote was mailed to the plaintiff by the clerk of the commissioners, and received by it on August 15, 1897; that thereafter upon the same day the plaintiff sent to the commissioners a

letter accepting the award of contract, which was duly received by the commissioners on or before August 18, 1897; that the plaintiff on that day, acting by its president, appeared before the commissioners and offered to execute a contract in the form annexed to the proposal submitted by the plaintiff, according to the terms of its proposal, and tendered at the same time an agreement with the required amount of liquidated damages for the faithful performance of the contract with a corporation qualified to do business in the State of Massachusetts as surety; that the plaintiff was on August 18, and ever since had been, ready and willing and able to execute the contract required by the terms of its proposal and the acceptance thereof by the commissioners, and to furnish an agreement with the required amount of liquidated damages for the faithful performance of the contract with a surety or sureties qualified to do business in the State of Massachusetts, and satisfactory to the commissioners; but the commissioners refused to execute the contract required by the award, and the plaintiff had suffered great loss.

The defendant demurred to the declaration, assigning various grounds of demurrer. In the Superior Court, the demurrer was sustained, and judgment ordered for the defendant; and the plaintiff appealed to this court.

O. Prescott, Jr., for the plaintiff.

T. M. Stetson, for the defendant.

ALLEN, J. The ground of action relied on by the plaintiff corporation is, not only that the county commissioners actually entered into a contract with it, under which it was to do the work, but that they agreed to enter into such a contract, and afterwards refused to do so. To support this view, the plaintiff relies on the vote of the county commissioners accepting its bid and awarding the contract. We have, therefore, to consider whether, in view of the circumstances, the vote bears that construction.

The vote is to be construed with reference to the advertisements under which the proposals of the plaintiff were submitted. The Contract mentioned in the vote is the same contract mentioned in the advertisement, namely, the contract which was to be executed within six days from the date of notification of the award, and of the preparation and readiness for signature of the contract. A formal written contract, according to the form submitted to the bidders, was expressly provided for. After the award, the parties

were to meet and execute such a contract. Where proposals and an award made thereon look to the future execution of the contract, such award is not necessarily a contract of any kind, nor an agreement to enter into a contract based upon the proposals; it is at most a matter to be determined whether such an agreement exists, upon a consideration of the terms and purpose of the award, construed in the light of the existing circumstances. In *Lyman v. Robinson*, 14 Allen, 242, where it was sought to establish a contract from letters, it was said: "A valid contract may doubtless be made by correspondence, but care should always be taken not to construe as an agreement letters which the parties intended only as preliminary negotiation. The question in such cases always is, Did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up, and by which alone they designed to be bound?" See also *Ridgeway v. Wharton*, 6 H. L. Cas. 238, and cases there cited; *Winn v. Bull*, 7 Ch. D. 29; *Rossiter v. Miller*, 3 App. Cas. 1124; *Starkey v. Minneapolis*, 19 Minn. 203; *Eads v. Carondelet*, 42 Mo. 113; *Pollock*, Con. 41. Especially where the supposed contract is found only in a vote passed by a board of public officers, which looks to the preparation and execution of a formal contract in the future, care must be taken not to hold that to be a contract which was intended only to signify an intention to enter into a contract. See *Dunham v. Boston*, 12 Allen, 375; *Water Commissioners v. Brown*, 3 Vroom, 504, 510.

In the present case, the county commissioners had advertised for proposals for doing a public work, with careful provisions looking to the final execution of a formal contract between themselves and the bidder whose proposals should be accepted. The bidders were to be bound to stand by their proposals, under a certain penalty or forfeiture. But the county was not to be bound until subsequently it should agree to be bound. The plaintiff concedes that no contract was made under which the work was to be done, but insists that the county commissioners did agree that they would thereafter enter into such a contract. We are unable to put that construction upon the vote. While it is possible for a party to agree in express terms to enter into an executory contract in the future (*Drummond v. Crane*, 159 Mass. 577, and *Pratt v. Hudson River Railroad*, 21 N. Y. 305), the present case is not one of that description. The vote was but a step in the negotiation. It showed an expecta-

tion and an intention, for the time being, to enter into a contract with the plaintiff upon the basis of its proposals. But the execution of the contract was an act to be done in the future, and till that should be done no intention to be legally bound is fairly to be inferred. The vote meant merely to say that the plaintiff's proposals were accepted, subject to the preparation and execution of a formal contract. There is nothing to indicate an intention to bind the county by a preliminary agreement that a formal contract should be executed in the future.

This is especially apparent when the state of the existing legislation concerning the powers and duties of county commissioners is considered. By St. 1897, c. 137, § 2, it was provided that all contracts made by county commissioners for the construction of public works, if exceeding eight hundred dollars in amount, shall be made in writing, after notice for proposals therefor has been published; that all proposals shall be publicly opened in the presence of a majority of the commissioners, and a record thereof made upon their record; that all such contracts shall be in writing, and recorded in a book to be kept for the purpose with the records of the county; and that no contract made in violation of the provisions of this section shall be valid against the county, and no payment thereon shall be made from the county treasury. By St. 1897, c. 153, a greatly increased strictness was established in respect to expenditures by counties, and the duties of county commissioners in respect thereto were defined, and their powers limited. In these statutes, the purpose of the Legislature to prevent wasteful or unnecessary county expenses is clearly manifested, and it is open to doubt whether it would now be in the power of county commissioners to bind a county by a preliminary agreement to enter into a future contract for the construction of a public work. This question, however, need not now be determined, because it is quite obvious that the county commissioners of Bristol County were seeking to conform carefully to the spirit of the provisions of the statutes, and that by their vote they did not intend to bind the county by a preliminary agreement, such as that upon which the plaintiff relies.

Judgment for the defendant affirmed.³³

³³ See also *Kingston-upon-Hull Guardians v. Petch*, 10 Ex. 610; *Weitz v. Independent District*, 79 Ia. 423; *Leskie v. Haseltine*, 155 Pa. 98.

An offer must be communicated.**ADAMS AND OTHERS v. LINDSELL AND ANOTHER.**

IN THE KING'S BENCH, JUNE 5, 1818.

(Reported in 1 Barnewall & Alderson, 681.)

Action for non-delivery of wool according to agreement. At the trial at the last Lent Assizes for the county of Worcester, before BURROUGH, J., it appeared that the defendants, who were dealers in wool at St. Ives, in the county of Huntingdon, had, on Tuesday, the 2d of September, 1817, written the following letter to the plaintiffs, who were woollen manufacturers residing in Bromsgrove, *Worcestershire*: "We now offer you eight hundred tods of wether fleeces, of a good fair quality of our country wool, at 35s. 6d. per tod, to be delivered at Leicester, and to be paid for by two months' bill in two months, and to be weighed up by your agent within fourteen days, *receiving your answer in course of post.*"

This letter was misdirected by the defendants to Bromsgrove, *Leicestershire*, in consequence of which it was not received by the plaintiffs in *Worcestershire* till 7 P. M. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between St. Ives and Bromsgrove is through London, and consequently this answer was not received by the defendants till Tuesday, September 9th. On the Monday, September 8th, the defendants, not having, as they expected, received an answer on Sunday, September 7th (which, in case their letter had not been misdirected, would have been in the usual course of the post), sold the wool in question to another person. Under these circumstances, the learned Judge held that, the delay having been occasioned by the neglect of the defendants, the jury must take it that the answer did come back in due course of post; and that then the defendants were liable for the loss that had been sustained: and the plaintiffs accordingly recovered a verdict.

Jervis having in Easter Term obtained a rule *nisi* for a new trial, on the ground that there was no binding contract between the parties.

Dauncey, *Puller*, and *Richardson* showed cause. They contended that, at the moment of the acceptance of the offer of the defendants by the plaintiffs, the former became bound. And that was on Fri-

day evening, when there had been no change of circumstances. They were then stopped by the Court, who called upon

Jervis and Campbell in support of the rule. They relied on *Payne v. Cave*, and more particularly on *Cooke v. Oxley*. In that case, Oxley, who had proposed to sell goods to Cooke, and given him a certain time, at his request, to determine whether he would buy them or not, was held not liable to the performance of the contract, even though Cooke, within the specified time, had determined to buy them, and given Oxley notice to that effect. So here the defendants who have proposed by letter to sell this wool, are not to be held liable, even though it be now admitted that the answer did come back in due course of post. Till the plaintiffs' answer was actually received, there could be no binding contract between the parties; and before then the defendants had retracted their offer by selling the wool to other persons. But

THE COURT said, that if that were so, no contract could even be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was traveling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them that the plaintiffs' answer was received in course of post.

Rule discharged.

An offer is made when it is communicated to the offeree.

BARTHOLOMEW *v.* JACKSON.

20 JOHNSON (N. Y.), 28.—1822.

In error, on *certiorari* to a justice's court. Jackson sued Bartholomew before a justice, for work and labor, etc. B. pleaded *non assumpsit*. It appeared in evidence, that Jackson owned a wheat stubble-field, in which B. had a stack of wheat, which he had promised to remove in due season for preparing the ground for a fall

crop. The time for its removal having arrived, J. sent a message to B., which, in his absence, was delivered to his family, requesting the immediate removal of the stack of wheat, as he wished, on the next day, to burn the stubble on the field. The sons of B. answered, that they would remove the stack by 10 o'clock the next morning. J. waited until that hour, and then set fire to the stubble, in a remote part of the field. The fire spreading rapidly, and threatening to burn the stack of wheat, and J., finding that B. and his sons neglected to remove the stack, set to work and removed it himself, so as to secure it for B.; and he claimed to recover damages for the work and labor in its removal. The jury gave a verdict for the plaintiff for 50 cents, on which the justice gave judgment, with costs.

PLATT, J. I should be very glad to affirm this judgment; for though the plaintiff was not legally entitled to sue for damages, yet to bring a *certiorari* on such a judgment was most unworthy. The plaintiff performed the service without the privity or request of the defendant, and there was, in fact, no promise, express or implied. If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as *gratuitous*, and it, therefore, forms no ground of action. The judgment must be reversed.

Judgment reversed.

FONSECA v. CUNARD STEAMSHIP COMPANY.

153 MASSACHUSETTS, 553.—1891.

Contract, with a count in tort, against the defendant, as owner of the steamship *Samaria*, for damage to the plaintiff's trunk and its contents.

When the plaintiff engaged his passage in London, he received a passage ticket from the defendant's agent there. This ticket consisted of a sheet of paper of large quarto size, the face and back of which were covered with written and printed matter. Near the top of the face of the ticket, after the name of the defendant corporation and its list of offices in Great Britain, appeared in bold type the following: "Passengers' Contract Ticket." Upon the side

margins were various printed notices to passengers, including the following:

“All passengers are requested to take notice that the owners of the ship do not hold themselves responsible for detention or delay arising from accident, extraordinary or unavoidable circumstances, nor for loss, detention, or damage to luggage.”

The body of the face of the ticket contained statements of the rights of the passenger respecting his person and his baggage, the plaintiff's name, age, and occupation, the bills of fare for each day of the week, and the hours for meals, etc. At the bottom was printed the following:

“Passengers' luggage is carried only upon the conditions set forth on the back hereof.”

Upon the back, among other printed matter, was the following:

“The company is not liable for loss of or injury to the passenger or his luggage, or delay in the voyage, whether arising from the act of God, the Queen's enemies, perils of the sea, rivers, or navigation, restraint of princes, rulers, and peoples, barratry, or negligence of the company's servants (whether on board the steamer or not), defect in the steamer, her machinery, gear, or fittings, or from any other cause of whatsoever nature.”

When the plaintiff received his ticket, his attention was not called in any way to any limitation of the defendant's liability.

KNOWLTON, J. It is not expressly stated in the report, that the law of England was put in evidence as a fact in the case, but it seems to have been assumed at the trial, if not expressly agreed that this law should be considered, and the argument before this court has proceeded on the same assumption. It is conceded that the presiding justice correctly found and ruled as follows: “That the contract was a British contract; that, by the English law, a carrier may by contract exempt himself from liability, even for loss caused by his negligence; that in this case, as the carrier has so attempted, and the terms are broad enough to exonerate him, the question remains of assent on the part of the plaintiff.” That part of his ruling which is called in question by the defendant is as follows: “This has been decided in Massachusetts to be a question of evidence, in which the *lex fori* is to govern; that, although it has been decided that the law conclusively presumes that a consignor knows and assents to the terms of a bill of lading or a shipping

receipt which he takes without dissent, yet a passenger ticket, even though it be called a 'contract ticket,' does not stand on the same footing; that in this case assent is not a conclusion of law, and is not proved as a matter of fact."

The principal question before us is whether the plaintiff, by reason of his acceptance, and use of his ticket, shall be conclusively held to have assented to its terms. It has often been decided, that one who accepts a contract, and proceeds to avail himself of its provisions, is bound by the stipulations and conditions expressed in it, whether he reads them or not. *Rice v. Dwight Manuf. Co.*, 2 Cush. 80; *Grace v. Adams*, 100 Mass. 505; *Hoadley v. Northern Transportation Co.*, 115 Mass. 304; *Monitor Ins. Co. v. Buffum*, 115 Mass. 343; *Germania Insurance Co. v. Memphis & Charleston Railroad*, 72 N. Y. 90. This rule is as applicable to contracts for the carriage of persons or property as to contracts of any other kind. *Grace v. Adams*, 100 Mass. 505; *Boston & Maine Railroad v. Chipman*, 146 Mass. 107; *Parker v. South Eastern Railway*, 2 C. P. D. 416, 428; *Harris v. Great Western Railway*, 1 Q. B. D. 515; *York Co. v. Central Railroad*, 3 Wall. 107; *Hill v. Syracuse, Binghamton & New York Railroad*, 73 N. Y. 351. The cases in which it is held that one who receives a ticket that appears to be a mere check showing the points between which he is entitled to be carried, and that contains conditions on its back which he does not read, is not bound by such conditions, do not fall within this rule. *Brown v. Eastern Railroad*, 11 Cush. 97; *Malone v. Boston & Worcester Railroad*, 12 Gray, 388; *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Railway Co. v. Stevens*, 95 U. S. 655. Such a ticket does not purport to be a contract which expressly states the rights of the parties, but only a check to indicate the route over which the passenger is to be carried, and he is not expected to examine it to see whether it contains any unusual stipulations. The precise question in the present case is whether the "contract ticket" was of such a kind that the passenger taking it should have understood that it was a contract containing stipulations which would determine the rights of the parties in reference to his carriage. If so, he would be expected to read it, and if he failed to do so, he is bound by its stipulations. It covered with print and writing the greater part of two large quarto pages, and bore the signature of the defendant company, affixed by its agent, with a blank space for the signature of the passenger. The fact that it was not signed by the plaintiff

is immaterial. *Quimby v. Boston & Maine Railroad*, 150 Mass. 365, and cases there cited. It contained elaborate provisions in regard to the rights of the passenger on the voyage, and even went into such detail as to give the bill of fare for each meal in the day for every day of the week. No one who could read could glance at it without seeing that it undertook expressly to prescribe the particulars which should govern the conduct of the parties until the passenger reached the port of destination. In that particular, it was entirely unlike the pasteboard tickets which are commonly sold to passengers on railroads. In reference to this question, the same rules of law apply to a contract to carry a passenger, as to a contract for the transportation of goods. There is no reason why a consignor who is bound by the provisions of a bill of lading, which he accepts without reading, should not be equally bound by the terms of a contract in similar form to receive and transport him as a passenger. In *Henderson v. Stevenson*, *ubi supra*, the ticket was for transportation a short distance, from Dublin to Whitehaven, and the passenger was held not bound to read the notice on the back, because it did not purport to be a contract, but a mere check given as evidence of his right to carriage. In later English cases, it is said that this decision went to the extreme limit of the law, and it has repeatedly been distinguished from cases where the ticket was in a different form. *Parker v. South Eastern Railway*, 2 C. P. D. 416, 428; *Burke v. South Eastern Railway*, 5 C. P. D. 1; *Harris v. Great Western Railway*, 1 Q. B. D. 515. The passenger in the last mentioned case had a coupon ticket, and it was held that he was bound to know what was printed as a part of the ticket. *Steers v. Liverpool, New York & Philadelphia Steamship Co.* (57 N. Y. 1) is in its essential facts almost identical with the case at bar, and it was held that the passenger was bound by the conditions printed on the ticket. In *Quimby v. Boston & Maine Railroad*, *ubi supra*, the same principle was applied to the case of a passenger traveling on a free pass, and no sound distinction can be made between that case and the case at bar.

We are of the opinion that the ticket delivered to the plaintiff purported to be a contract, and that the defendant corporation had a right to assume that he assented to its provisions. All these provisions are equally binding on him as if he had read them.

The contract being valid in England, where it was made, and the plaintiff's acceptance of it under the circumstances being equivalent to an express assent to it, and it not being illegal or

immoral, it will be enforced here, notwithstanding that a similar contract made in Massachusetts would be held void as against public policy. *Greenwood v. Curtis*, 6 Mass. 358; *Forepaugh v. Delaware, Lackawanna & Western Railroad*, 128 Penn. St. 217, and cases cited; *In re Missouri Steamship Co.*, 42 Ch. D. 321, 326, 327; *Liverpool and Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397.

Judgment for the defendant.³⁴

BENTON v. SPRINGFIELD YOUNG MEN'S CHRISTIAN ASSOCIATION.

170 MASSACHUSETTS, 534.—1898.

Action in contract by Benton against the Springfield Young Men's Christian Association to recover damages for the refusal of the Association to allow him to perform the duties of architect in the erection of a building. Plaintiff made an offer of proof of his whole case in writing, upon which the trial court ruled that, as matter of law, it was not sufficient to maintain the action, and gave judgment for defendant. Plaintiff alleged exceptions. The facts appear in the opinion.

ALLEN, J. The "notice to architects" issued by the committee of the defendant invited the plaintiff and other architects "to participate in the competition for plans, on the conditions" therein stated. One of these conditions was that "the committee reserve the right to reject any and all of the designs submitted." According to the plaintiff's offer of proof, he presented to the committee a full set of drawings of the proposed building. Other architects did the same. The committee thereupon, on May 19, 1893, passed a vote "that we proceed to examine drawings and specifications presented to us on basis of compliance with each and every requirement in our letter of invitation; and, after considering and discussing each requirement separately, a vote of the committee be taken as to which plan best meets the letter of requirements and the needs of the Association, and that, on completion of this examination, we select the architect who has the largest number of

³⁴ Accord: *Zimmer v. N. Y. C. etc. R.*, 137 N. Y. 460; *Ballou v. Earle*, 17 R. I. 441.

votes." The offer of proof also states that the committee "agreed that the person who should receive the greatest number of votes should superintend the construction of the same." This can mean only that they so agreed amongst themselves. The next day, another meeting of the committee was held, and the plaintiff was found to have received the greatest number of first marks in the competition. Afterwards at this meeting the committee voted to reject all the plans submitted, and to return them to their owners, and all the plans were rejected. Immediately after this vote had been passed, another vote was passed that the plaintiff "be chosen architect in accordance with the vote of last night"; the words "vote of last night" having reference to the receipt of the greatest number of first marks. This vote remained upon the books of the defendant for forty days without being changed, at the end of which time it was rescinded. The committee did not, as a committee, communicate this vote to the plaintiff or ask him to act under it, but two members of the committee notified him that he had been appointed as architect of the building, and this fact was known to the secretary of the committee, and also to other members of the committee, who made no objections to the notification, and did nothing in regard to the matter until the time of passing the vote of rescission. On July 3, 1893, the plaintiff wrote a letter to the committee claiming to act as architect, and saying that he had just heard that the committee had lately taken action which appeared to show their intention to deprive him of the position. The committee answered that no contract with him had been made. The offer of proof stated that this letter of the plaintiff was written within the forty days; but, by the dates given, the time is forty-four days. No explanation of this apparent inconsistency has been given to us, but in the view we take of the case it becomes immaterial. The subsequent statement that these letters were not written until after the vote appointing the plaintiff had been upon the books for about forty days, and the members of the committee had known that the plaintiff had been notified as aforesaid, must be construed to refer only to those members of the committee previously referred to, as knowing the fact of the notification given to the plaintiff by two members of the committee.

It is apparent, in the first place, that no contract arose out of the "notice to architects" and the presentation of plans by the plaintiff, because the right to reject any and all of the designs sub-

mitted was expressly reserved, and this right was exercised by a formal vote.

The plaintiff, however, contends that his presentation of plans was an offer of his services as architect of the building, and that this offer was accepted by the vote of May 20th. There is nothing in the offer of proof to support this position. The notice to architects called simply for the submission of plans, with a description and explanation of them. Rejected designs were to be returned to their authors without any compensation. The plaintiff submitted drawings "in the manner specified." There is nothing to show that, either by express words or by implication, he offered or was understood to offer his services as architect, unless his plans should be accepted. The vote rejecting his plans rejected all that he had offered.

The new vote, that he be chosen architect, was not an offer to him. It was not communicated to him by the committee, nor voted to be so communicated. Those members who gave notice of the vote to the plaintiff did not act for or by authority of the committee. Their notification was not official, and did not purport to be so. The vote did not specify any terms or duties in detail, and it was not in form or intention a contract or the offer of a contract. It was merely an initiatory step, signifying the intention or purpose of the committee, and was not an act by which they meant to be bound as by a contract. If the plaintiff had notified them at once that he would act as architect, in pursuance of their vote, they might have answered that their vote was not a proposal or offer to him. *Shaw v. Stone*, 1 Cush. 228, 244; *Dunham v. City of Boston*, 12 Allen, 375; *Sears v. Railway Co.*, 152 Mass. 151; *Edge Moor Bridge Works v. Bristol County*, 170 Mass. 528.

If the plaintiff's letter was sent after the formal rescission of the vote, the plaintiff would fail to maintain his case for the additional reason that his acceptance of an offer after it had been recalled would be too late. But the decision is not put upon that ground, because, upon the facts stated, the vote was not a proposal or offer to him, and he could not convert it into a contract by signifying his acceptance of it, even though he acted promptly.

Exceptions overruled.

Acceptance must be communicated.**DUNLOP v. HIGGINS.**

IN THE HOUSE OF LORDS, FEBRUARY 21, 22, 24, 1848.

DUNLOP AND OTHERS, *Appellants*.VINCENT HIGGINS AND OTHERS, *Respondents*.*(Reported in 1 House of Lords Cases, 381.)*

This was an appeal against a decree of the Court of Session, made under the following circumstances: Messrs. Dunlop & Co. were iron masters in Glasgow, Messrs. Higgins & Co. were iron merchants in Liverpool. Messrs. Higgins had written to Messrs. Dunlop respecting the price of iron, and received the following answer: "Glasgow, 22d January, 1845. We shall be glad to supply you with 2000 tons, pigs, at 65 shillings per ton, net, delivered here." Messrs. Higgins wrote the following reply: "Liverpool, 25th January, 1845. You say 65s. net, for 2000 tons pigs. Does this mean for our usual four-months' bill? Please give us this information in course of post, as we have to decide with other parties on Wednesday next." On the 28th Messrs. Dunlop wrote, "Our quotation meant 65s. net, and not a four-months' bill." This letter was received by Messrs. Higgins on the 30th of January, and on the same day, and by post, but not by the first post of that day, they despatched an answer in these terms: "We will take the 2000 tons pigs you offer us. Your letter crossed ours of yesterday, but we shall be glad to have your answer respecting the additional 1000 tons. In your first letter you omitted to state any terms; hence the delay." This letter was dated "31st January." It was not delivered in Glasgow until 2 o'clock P. M. on the 1st of February, and, on the same day, Messrs. Dunlop sent the following reply: "Glasgow, 1st February, 1845. We have your letter of *yesterday*, but are sorry that we cannot now enter the 2000 tons pig-iron, our offer of the 28th not having been accepted in course." Messrs. Higgins wrote on the 2d February to say that they had erroneously dated their letter on the 31st January, that it was really written and posted on the 30th, in proof of which they referred to the post-mark. They did not, however, explain the delay which had taken place in its delivery. The iron was not furnished to them, and iron having risen very rapidly in the market, the question

whether there had been a complete contract between these parties was brought before a court of law. Messrs. Higgins instituted a suit in the Court of Sessions for damages, as for breach of contract. The defense of Messrs. Dunlop was, that their letter of the 28th, offering the contract, not having been answered in due time, there had been no such acceptance as would convert that offer into a lawful and binding contract; that their letter having been delivered at Liverpool before eight o'clock in the morning of the 30th of January, Messrs. Higgins ought, according to the usual practice of merchants, to have answered it by the first post, which left Liverpool at three o'clock P. M. on that day. A letter so despatched would be due in Glasgow at two o'clock P. M. on the 31st of January; another post left Liverpool for Glasgow every day at one o'clock A. M., and letters to be despatched by that post must be put into the office during the preceding evening, and if any letter had been sent by that post on the morning of the 31st, it must have been delivered in Glasgow in the regular course of post at eight o'clock in the morning of the 1st of February. As no communication from Messrs. Higgins arrived by either of these posts, Messrs. Dunlop contended that they were entitled to treat their offer as not accepted, and that they were not bound to wait until the third post delivered in Glasgow at two o'clock P. M. of Saturday, the 1st of February (at which time Messrs. Higgins' letter did actually arrive), before they entered into other contracts, the taking of which would disable them from performing the contract they had offered to Messrs. Higgins.³⁵

Mr. *Bethell* and Mr. *Anderson*, for the appellants.

Mr. *Stuart Wortley* and Mr. *Hugh Hill*, for the respondents, were not called on.

THE LORD CHANCELLOR.³⁶ The case certainly appears to me one which requires great ingenuity on the part of the appellants, because I do not think that, in the facts of the case, there is anything to warrant the appeal. The contest arises from an order sent from Liverpool to Glasgow, or rather a proposition sent from Glasgow to Liverpool, and accepted by the house at Liverpool. It is unnecessary to go earlier into the history of the case than the letter sent from Liverpool by Higgins, bearing date the 31st of

³⁵ The statement of the proceedings in the lower courts have been omitted.

³⁶ Lord Cottenham. Portions of the opinions are omitted.

January. A proposition had been made by the Glasgow house of Dunlop, Wilson & Co., to sell 2,000 tons of pig-iron. The answer is of that date of the 31st of January: "Gentlemen, we will take the 2,000 tons, pigs, you offer us." Another part of the letter refers to other arrangements; but there is a distinct and positive offer to take the 2,000 tons of pigs. To that letter there is annexed a postscript in which they say, "We have accepted your offer unconditionally; but we hope you will accede to our request as to delivery and mode of payment by two months' bill."

That, my Lords, therefore, is an unconditional acceptance, by the letter dated the 31st of January, which was proved to have been put into the post-office at Liverpool on the 30th; but it was not delivered, owing to the state of severe frost at that time, which delayed the mail from reaching Glasgow at the time at which, in the ordinary course, it would have arrived there. The letter having been put in on the 30th of January, it ought to have arrived at Glasgow on the following day, but it did not arrive till the 1st of February.

The first question raised by the first exception applies not to the summing up of the learned Judge, but to the admission of evidence by him.

My Lords, the exception states, "that the pursuers having admitted that they were bound to answer the defenders' offer of the 28th, by letter written and posted on the 30th, and the only answer received by the defenders being admitted to be dated on the 31st of January, and received in Glasgow by the mail which in due course ought to bring the Liverpool letters of the 31st, but not Liverpool letters of the 30th, it is not competent in a question as to the right of the defenders to withdraw or fall from the offer, to prove that the letter bearing date of 31st of January was written and dispatched from Liverpool on the 30th, and prevented by accident from reaching Glasgow in due course, especially as it is not alleged that the defenders were aware (previous to the 3d of February) of any such accident having occurred."

The exception is that the learned Judge was wrong in permitting the pursuer to explain his mistake. The proposition is, that if a man is bound to answer a letter on a particular day, and by mistake puts a date in advance, he is to be bound by his error, whether it produces mischief to the other party or not. It is unnecessary to do more than state this proposition in order to induce you to assent to the view I take of the objection, and to come to the conclusion

that the learned Judge was right in allowing the pursuer to go into evidence to show the mistake.

The next exception to be considered is the second, and that raises a more important question, though not one attended with much difficulty. The exception is, that his Lordship did direct the jury in point of law, that if the pursuers posted their acceptance of the offer in due time, according to the usage of trade, they are not responsible for any casualties in the post-office establishment.

Now, there may be some little ambiguity in the construction of that proposition. It proceeds on the assumption that, by the usage of trade, an answer ought to have been returned by the post, and that the 30th was the right day on which that answer ought to have been notified. Then comes the question, whether under those circumstances, that being the usage of trade, the fact of the letter being delayed, not by the act of the party sending it, but by an accident connected with the post, the party so putting the letter in on the right day is to lose the benefit which would have belonged to him if the letter had arrived in due course?

I cannot conceive, if that is the right construction of the direction of the learned Judge, how any doubt can exist on the point. If a party does all that he can do, that is all that is called for. If there is a usage of trade to accept such an offer, and to return an answer to such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done everything he was bound to do? How can he be responsible for that over which he has no control? It is not the same as if the date of the party's acceptance of the offer had been the subject of a special contract: as if the contract had been, "I make you this offer, but you must return me an answer on the 30th, and on the earliest post of that day." The usage of trade would require an answer on the day on which the offer was received, and Messrs. Higgins, therefore, did on the 30th, in proper time, return an answer by the right conveyance—the post-office.

If that was not correct, and if you were to have reference now to any usage constituting the contract between the parties a specific contract, it is quite clear to me that the rule of law would necessarily be that which has obtained by the usage of trade. It has been so decided in cases in England, and none has been cited from Scotland which controverts that proposition; but the cases in England put it beyond all doubt. It is not disputed—it is a very

frequent occurrence—that a party having a bill of exchange, which he tenders for payment to the acceptor, and payment is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time, it has been held quite sufficient; he has done all that he is expected to do as far as he is concerned; he has put the letter into the post, and whether that letter be delivered or not, is a matter quite immaterial, because for accidents happening at the post-office he is not responsible.

My Lords, the case of *Stocken v. Collin*³⁷ is precisely a case of that nature, where the letter did not arrive in time. In that case Baron Parke says, "It was a question for the jury whether the letter was put into the post-office in time for delivery on the 28th. The post-office mark certainly raised a presumption to the contrary, but it was not conclusive. The jurors have believed the testimony of the witness who posted the letter, and the verdict was therefore right. If a party puts a notice of dishonor into the post, so that in due course of delivery it would arrive in time, he has done all that can be required to him, and it is no fault of his if delay occurs in the delivery." Baron Alderson says, "The party who sends the notice is not answerable for the blunder of the post-office. I remember to have held so in a case on the Norfolk Circuit, where a notice addressed to Norwich had been sent to Warwick. If the doctrine that the post-office is only the agent for the delivery of the notice was correct, no one could safely avail himself of that mode of transmission. The real question is whether the party has been guilty of laches."

There is also the other case which has been referred to, which declares the same doctrine, the case of *Adams v. Lindsell*. That is a case where the letter went, by the error of the party sending it, to the wrong place, but the party receiving it answered it, so far as he was concerned, in proper time. The party, however, who originally sent the offer not receiving the answer in proper time, thought he was discharged, and entered into a contract and sold the goods to somebody else. The question was, whether the party making the offer had a right to withdraw after notice of acceptance. He sold the goods after the party had written the letter of acceptance, but before it arrived he said, "I withdraw my offer." Therefore he said, "before I received your acceptance of my offer I had withdrawn it." And that raised the question when the accept-

³⁷ 7 Meeson & Welsby, 515.

ance took place, and what constituted the acceptance. It was argued, that "till the plaintiff's answer was actually received, there could be no binding contract between the parties, and that before then the defendants had retracted their offer by selling the wool to other persons." But the Court said, "If that were so, no contract could ever be completed by the post, for if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was traveling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter."

Those two cases leave no doubt at all on the subject. Common sense tells us that transactions cannot go on without such a rule, and these cases seem to be the leading cases on the subject, and we have heard no authority cited which in the least degree affects the principle on which they proceed. The law of Scotland appears to be the same as the law of England, for Mr. Bell's Commentary lays down the same rule as existing in Scotland, and nothing has been stated to us in contradiction of his opinion.

It was ordered that the interlocutor complained of should be affirmed with costs.

ROYAL INS. CO. *v.* BEATTY.

119 PENNSYLVANIA STATE, 6.—1888.

Assumpsit to recover upon two policies of insurance.

At the close of the testimony, the defendant requested the court to charge the jury that there was no evidence of an acceptance by the defendant of the offer of the plaintiff to renew the policies, and to direct a verdict for the defendant. The court refused the request, and submitted the question to the jury. Verdict for plaintiff.

GREEN, J. We find ourselves unable to discover any evidence of a contractual relation between the parties to this litigation. The contract alleged to exist was not founded upon any writing, nor upon any words, nor upon any act done by the defendant. It was

founded alone upon silence. While it must be conceded that circumstances may exist which will impose a contractual obligation by mere silence, yet it must be admitted that such circumstances are exceptional in their character, and of extremely rare occurrence. We have not been furnished with a perfect instance of the kind by the counsel on either side of the present case. Those cited for defendant in error had some other element in them than mere silence, which contributed to the establishment of the relation.

But in any point of view it is difficult to understand how a legal liability can arise out of the mere silence of the party sought to be affected, unless he was subject to a duty of speech, which was neglected to the harm of the other party. If there was no duty of speech, there could be no harmful omission arising from mere silence. Take the present case as an illustration. The alleged contract was a contract of fire insurance. The plaintiff held two policies against the defendant, but they had expired before the loss occurred and had not been formally renewed. At the time of the fire, the plaintiff held no policy against the defendant. But he claims that the defendant agreed to continue the operation of the expired policies by what he calls "binding" them. How does he prove this? He calls a clerk, who took the two policies in question, along with other policies of another person, to the agent of the defendant to have them renewed, and this is the account he gives of what took place: "The Royal Company had some policies to be renewed, and I went in and bound them. Q. State what was said and done. A. I went into the office of the Royal Company and asked them to bind the two policies of Mr. Beatty expiring tomorrow. The Court: Who were the policies for? A. For Mr. Beatty. The Court: That is your name, is it not? A. Yes, sir. These were the policies in question. I renewed the policies of Mr. Priestly up to the 1st of April. There was nothing more said about the Beatty policies at that time. The Court: What did they say? A. They did not say anything, but I suppose that they went to their books to do it. They commenced to talk about the night privilege, and that was the only subject discussed." In his further examination he was asked: "Q. Did you say anything about those policies (Robert Beatty's) at that time? A. No, sir; I only spoke of the two policies for William Beatty. Q. What did you say about them? A. I went in and said, 'Mr. Skinner, will you renew the Beatty policies and the night privilege for Mr. Priestly?' and that ended it. Q. Were the other companies bound in the

same way? A. Yes, sir; and I asked the Royal Company to bind Mr. Beatty."

The foregoing is the whole of the testimony for the plaintiff as to what was actually said at the time when it is alleged the policies were bound. It will be perceived that all that the witness says is, that he asked the defendant's agent to bind the two policies, as he states at first, or to renew them, as he says last. He received no answer, nothing was said, nor was anything done. How is it possible to make a contract out of this? It is not as if one declares or states a fact in the presence of another and the other is silent. If the declaration imposed a duty of speech on peril of an inference from silence, the fact of silence might justify the inference of an admission of the truth of the declared fact. It would then be only a question of hearing, which would be chiefly if not entirely for the jury. But here the utterance was a question and not an assertion, and there was no answer to the question. Instead of silence being evidence of an agreement to do the thing requested, it is evidence, either that the question was not heard, or that it was not intended to comply with the request. Especially is this the case when, if a compliance was intended, the request would have been followed by an actual doing of the thing requested. But this was not done; how then can it be said it was agreed to be done? There is literally nothing upon which to base the inference of an agreement, upon such a state of facts. Hence the matter is for the court and not for the jury; for if there may not be an inference of the controverted fact, the jury must not be permitted to make it.

What has thus far been said relates only to the effect of the non-action of the defendant, either in responding or in doing the thing requested. There remains for consideration the effect of the plaintiff's non-action. When he asked the question whether defendant would bind or renew the policies and obtained no answer, what was his duty? Undoubtedly to repeat his question until he obtained an answer. For his request was that the defendant should make a contract with him, and the defendant says nothing. Certainly such silence is not an assent in any sense. There should be something done, or else something said before it is possible to assume that a contract was established. There being nothing done and nothing said, there is no footing upon which an inference of an agreement can stand. But what was the position of the plaintiff? He had asked the defendant to make a contract with him and the defendant had not agreed to do so; he had not even answered the

question whether he would do so. The plaintiff knew he had obtained no answer, but he does not repeat the question; he, too, is silent thereafter, and he does not get the thing done which he asks to be done. Assuredly it was his duty to speak again, and to take further action if he really intended to obtain the defendant's assent. For what he wanted was something affirmative and positive, and without it he has no status. But he desists, and does and says nothing further. And so it is that the whole of the plaintiff's case is an unanswered request to the defendant to make a contract with the plaintiff, and no further attempt by the plaintiff to obtain an answer, and no actual contract made. Out of such facts it is not possible to make a legal inference of a contract.

The other facts proved and offered to be proved, but rejected improperly, as we think, and supposed by each to be consistent with his theory, tend much more strongly in favor of the defendant's theory than of the plaintiff's. It is not necessary to discuss them, since the other views we have expressed are fatal to the plaintiff's claim. Nor do I concede that if defendant heard plaintiff's request and made no answer, an inference of assent should be made. For the hearing of a request and not answering it is as consistent, indeed, more consistent, with a dissent than an assent. If one is asked for alms on the street, and hears the request, but makes no answer, it certainly cannot be inferred that he intends to give them. In the present case there is no evidence that defendant heard the plaintiff's request, and without hearing there was, of course, no duty of speech.

Judgment reversed.

HOBBS *v.* MASSASOIT WHIP CO

158 MASSACHUSETTS, 194.—1893.

HOLMES, J. This is an action for the price of eelskins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendants declined to accept the skins. The case comes before us on exceptions to an instruction to the jury, that, whether there was any prior contract or not, if the skins are sent to the defendant, and it sees fit, whether it has agreed to take them or not, to lie back, and to say nothing, having

reason to suppose that the man who has sent them believes that it is taking them, since it says nothing about it, then, if it fails to notify, the jury would be warranted in finding for the plaintiff.

Standing alone, and unexplained, this proposition might seem to imply that one stranger may impose a duty upon another, and make him a purchaser, in spite of himself, by sending goods to him, unless he will take the trouble, and be at the expense, of notifying the sender that he will not buy. The case was argued for the defendant on that interpretation. But, in view of the evidence, we do not understand that to have been the meaning of the judge, and we do not think that the jury can have understood that to have been his meaning. The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eel-skins in the same way four or five times before, and they had been accepted and paid for. On the defendant's testimony, it is fair to assume that, if it had admitted the eelskins to be over twenty-two inches in length, and fit for its business, as the plaintiff testified, and the jury found that they were, it would have accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins. In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. See *Bushell v. Wheeler*, 15 Q. B. 442; Benjamin on Sales, §§ 162, 164; *Taylor v. Dexter Engine Co.*, 146 Mass. 613, 615. The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party,—a principle sometimes lost sight of in the cases. *O'Donnell v. Clinton*, 145 Mass. 461, 463; *McCarthy v. Boston & Lowell Railroad*, 148 Mass. 550, 552.

Exceptions overruled.

Acceptance is communicated when it is made in the manner indicated by the offerer.

TAYLOE v. MERCHANTS' FIRE INS. CO.

9 HOWARD (U. S.), 390.—1850.

NELSON, J. This is an appeal from a decree of the Circuit Court for the District of Maryland, which was rendered for the defendants.

The case in the court below was this. William H. Tayloe, of Richmond County, Virginia, applied to John Minor, the agent of the defendants, residing at Fredericksburg in that State, for an insurance upon his dwelling-house to the amount of \$8,000 for one year, and, as he was about leaving home for the State of Alabama, desired the agent to make the application in his behalf.

The application was made accordingly, under the date of 25th November, 1844, and an answer received from the secretary of the company, stating that the risk would be taken at seventy cents on the thousand dollars, the premium amounting to the sum of fifty-six dollars. The agent stated in the application to the company the reason why it had not been signed by Tayloe; that he had gone to the State of Alabama on business, and would not return till February following; and that he was desired to communicate to him at that place the answer of the company.

On receiving the answer, the agent mailed a letter directed to Tayloe, under date of the 2d of December, advising him of the terms of the insurance, and adding, "Should you desire to effect the insurance, send me your check payable to my order for \$57, and the business is concluded." The additional dollar was added for the policy.

This letter, in consequence of a misdirection, did not reach Tayloe till the 20th of the month; who, on the next day, mailed a letter in answer to the agent, expressing his assent to the terms, and inclosing his check for the premium as requested. He also desired that the policy should be deposited in the bank for safe-keeping. This letter of acceptance was received on the 31st at Fredericksburg by the agent, who mailed a letter in answer the next day, communicating to Tayloe his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the center building of the dwelling-house in the meantime, on the 22d of the month, having been consumed by fire.

The company, on being advised of the facts, confirmed the view taken of the case by their agent, and refused to issue the policy or pay the loss.

A bill was filed in the court below by the insured against the company, setting forth, substantially, the above facts, and praying that the defendants might be decreed to pay the loss, or for such other relief as the complainant might be entitled to.

I. Several objections have been taken to the right of the complainant to recover, which it will be necessary to notice; but the principal one is, that the contract of insurance was not complete at the time the loss happened, and therefore that the risk proposed to be assumed had never attached.

Two positions have been taken by the counsel for the company for the purpose of establishing this ground of defense.

1. The want of notice to the agent of the company of the acceptance of the terms of the insurance; and,

2. The non-payment of the premium.

The first position assumes that, where the company have made an offer through the mail to insure upon certain terms, the agreement is not consummated by the mere acceptance of the offer by the party to whom it is addressed; that the contract is still open and incomplete until the notice of acceptance is received; and that the company are at liberty to withdraw the offer at any time before the arrival of the notice; and this even without communicating notice of the withdrawal to the applicant; in other words, that the assent of the company, expressed or implied, after the acceptance of the terms proposed by the insured, is essential to a consummation of the contract.

The effect of this construction is, to leave the property of the insured uncovered, until his acceptance of the offer has reached the company, and has received their assent; for, if the contract is incomplete until notice of the acceptance, till then the company may retract the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties.

In our apprehension, this view of the transaction is not in accordance with the usages and practice of these companies in taking risks; nor with the understanding of merchants and other business men dealing with them; nor with the principles of law, settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance.

On the contrary, we are of opinion that an offer under the cir-

cumstances stated, prescribing the terms of insurance, is intended and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.

This view of the effect of the correspondence seems to us to be but carrying out the intent of the parties, as plainly manifested by their acts and declarations.

On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected.

Such is the plain import of the offer. And besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be, in turn, proposed by the applicant to the company for their approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance.

It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view in entering upon the correspondence.

The fallacy of the argument, in our judgment, consists in the assumption, that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show, that in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

The position may be illustrated by the case before us. If the contract became complete, as we think it did, on the acceptance of the offer by the applicant, on the 21st of December, 1844, the company, of course, could have no knowledge of it until the letter of acceptance reached the agent, on the 31st of the month; and, on

the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and, indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other.

The negotiations being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and if the process is to be carried farther in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed?

We have said that this view is in accordance with the usages and practice of these companies, as well as with the general principles of law governing contracts entered into by absent parties.

In the instructions of this company to their agent at Fredericksburg, he is advised to transmit all applications for insurance to the office for consideration; and that, upon the receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate the acceptance to the company;

and the policy to be thereafter issued is to bear date from the time of the acceptance.

The company desire no further communication on the subject, after they have settled upon the terms of the risk, and sent them for the inspection of the applicant, in order to the consummation of the bargain. The communication of the acceptance by the agent afterward is to enable them to make out the policy. The contract is regarded as complete on the acceptance of the terms.

This appears, also, to have been the understanding of the agent; for, on communicating to the insured the terms received from the company, he observes, "Should you desire to effect the above insurance, send me your check payable to my order for fifty-seven dollars, and the business is concluded"; obviously enough importing, that no other step would be necessary to give effect to the insurance of the property upon the terms stated.

The cases of *Adams v. Lindsell* (1 Barn. & Ald. 681) and *Mac-tier's Adm'rs v. Frith* (6 Wend. 104) are authorities to show that the above view is in conformity with the general principles of law governing the formation of all contracts entered into between parties residing at a distance by means of correspondence.

The unqualified acceptance by the one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain from the time of the transmission of the acceptance.

This is also the effect of the case of *Eliason v. Henshaw* (4 Wheat. 228) in this court, though the point was not necessarily involved in the decision of the case. The acceptance there had not been according to the terms of the bargain proposed, for which reason the plaintiff failed.

The next position against the claim is the non-payment of the premium.

One of the conditions annexed to the policies of the company is, that no insurance will be considered as made or binding until the premium be actually paid; and one of the instructions to the agent was, that no credit should be given for premiums under any circumstances.

But the answer to this objection is, that the premium, in judgment of law, was actually paid at the time the contract became complete. The mode of payment had not been prescribed by the company, whether in specie, bills of a particular bank, or otherwise; the agent, therefore, was at liberty to exercise a discretion in the matter, and prescribe the mode of payment; and, accordingly, we

find him directing, in this case, that it may be paid by a check payable to his order for the amount. It is admitted that the insured had funds in the bank upon which it was drawn, at all times from the date of the check until it was received by the agent, sufficient to meet it; and that it would have been paid on presentment.

It is not doubted that, if the check for the premium had been received by the agent from the hands of the insured, it would have been sufficient; and in the view we have taken of the case, the transmission of it by mail, according to the directions given, amount, in judgment of law, to the same thing. Doubtless, if the check had been lost or destroyed in the transmission, the insured would have been bound to make it good; but the agent, in this respect, trusted to his responsibility, having full confidence in his ability and good faith in the transaction.

* * * * *

Decree reversed.³⁸

What amounts to an acceptance of an offer.

BYRNE & CO. v. LEON VAN TIENHOVEN & CO.

IN THE COMMON PLEAS DIVISION, MARCH 6, 1880.

(Reported in 5 Common Pleas Division, 344.)

LINDLEY, J.³⁹ This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of 1,000 boxes of tinplates pursuant to an alleged contract.

The defendants carried on business at Cardiff and the plaintiffs at New York, and it takes ten or eleven days for a letter posted at either place to reach the other. The defendants on October 1 offered to sell to the plaintiffs 1,000 boxes of tinplates at 15s 6d a

³⁸ Accord: *Mactier v. Frith*, 6 Wend. 103; *Vassar v. Camp*, 11 N. Y. 441; *Trevor v. Wood*, 36 N. Y. 307; *Wheat v. Cross*, 31 Md. 99; *Patterson v. Bowman*, 149 U. S. 411; *Perry v. Mount Hope Iron Co.*, 15 R. I. 380. In *Vassar v. Camp* it is held to be no defense to an action for breach of contract that the letter of acceptance was never received. Contra: *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278; *Lewis v. Browning*, 130 Mass. 173.

³⁹ A brief statement of facts has been substituted for the statement of the court. Only so much of the opinion is given as relates to the question of revocation.

box, "subject to your cable on or before the 15th inst. here." The plaintiff sent a telegram on October 11th accepting this offer, and confirmed it by letter dated October 15th. On October 8th the defendants wrote a letter withdrawing their offer. This letter reached the plaintiffs on October 20, but they claimed the revocation was ineffectual and brought this action.

There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not. *Routledge v. Grant*, 4 Bing. 653. For the decision of the present case, however, it is necessary to consider two other questions, viz.: 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?

It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This is the view taken in the United States: see *Tayloe v. Merchants Fire Insurance Co.*, 9 How. Sup. Ct. Rep. 390, cited in Benjamin on Sales, pp. 56-58, and it is adopted by Mr. Benjamin. The same view is taken by Mr. Pollock in his excellent work on Principles of Contract, ed. ii., p. 10, and by Mr. Leake in his Digest of the Law of Contracts, p. 43. This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass, therefore, to the next question, viz., whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on the 1st of October, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th, accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed

the moment the letter accepting the offer is posted: *Harris' Case*, Law Rep. 7 Ch. 587; *Dunlop v. Higgins*, I. H. L. 381, even although it never reaches its destination. When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the postoffice his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th of October is to be treated as communicated to the plaintiff on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post; and they had themselves resold the tin plates at a profit. In my opinion the withdrawal by the defendants on the 8th of October of their offer of the 1st was inoperative; and a complete contract binding on both parties was entered into on the 11th of October, when the plaintiffs accepted the offer of the 1st; which they had no reason to suppose had been withdrawn. Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that the letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles and practical convenience require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.⁴⁰

In *Patrick v. Bowman*, 149 U. S. 411, the Court, after holding that a revocation of an offer was ineffectual if not received before acceptance,

⁴⁰ *Stevenson v. McLean*, 5 Q. B. D. 346; *Henthorn v. Fraser* (1892) 2 Ch. 27; *Re London & Northern Bank* (1900) 1 Ch. 220; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390; *Patrick v. Bowman*, 149 U. S. 411, 424; *The Palo Alto*, 2 Ware, 343; *Brauer v. Shaw*, 168 Mass. 198. Acc.; *Kempner v. Cohn*, 47 Ark. 519; *Sherwin v. Nat. Cash Register Co.*, 5 Col. App. 162; *Wheat v. Cross*, 31 Md. 99.

said (at p. 424): "There is indeed, in a case of this kind, some reason for urging that the party making the revocation should be estopped to claim that his attempted withdrawal was not binding upon himself; but this could not be done without infringing upon the inexorable rule that one party to a contract cannot be bound unless the other be also, notwithstanding that the principle of mutuality thus applied may enable a party to take advantage of the invalidity of his own act."

Failure to accept in prescribed manner.

HYDE *v.* WRENCH.

IN CHANCERY, DECEMBER 8, 1840.

(Reported in 3 Beavan, 334.)

This case came on upon general demurrer to a bill for specific performance, which stated to the effect the following:

The defendant, being desirous of disposing of an estate, offered, by his agent, to sell it to the plaintiff for £1,200, which the plaintiff, his agent, declined; and on the 6th of June the defendant wrote to his agent as follows: "I have to notice the refusal of your friend to give me £1,200 for my farm; I will only make one more offer, which I shall not alter from; that is, £1,000 lodged in the bank until Michaelmas, when title shall be made clear of expenses, land tax, etc. I expect a reply by return, as I have another application." This letter was forwarded to the plaintiff's agent, who immediately called on the defendant; and, previously to accepting the offer, offered to give the defendant £950 for the purchase of the farm, but the defendant wished to have a few days to consider.

On the 11th of June the defendant wrote to the plaintiff's agent as follows: "I have written to my tenant for an answer to certain inquiries, and, the instant I receive his reply will communicate with you, and endeavor to conclude the prospective purchase of my farm. I assure you I am not treating with any other person about said purchase."

The defendant afterwards promised he would give an answer about accepting the £950 for the purchase on the 26th of June; and on the 27th he wrote to the plaintiff's agent, stating he was sorry he could not feel disposed to accept his offer for his farm at Luddenham at present.

This letter being received on the 29th of June, the plaintiff's agent on that day wrote to the defendant as follows: "I beg to acknowledge the receipt of your letter of the 27th inst., informing me that you are not disposed to accept the sum of £950 for your farm at Luddenham. This being the case, I at once agree to the terms on which you offered the farm, viz.: £1,000, through your tenant, Mr. Kent, by your letter of the 6th inst. I shall be obliged by your instructing your solicitor to communicate with me without delay, as to the title, for the reason which I mentioned to you."

The bill stated that the defendant "returned a verbal answer to the last-mentioned letter, to the effect he would see his solicitor thereon"; and it charged that the defendant's offer for sale had not been withdrawn previous to its acceptance.

To this bill, filed by the alleged purchaser for a specific performance, the defendant filed a general demurrer.

Mr. *Kindersley* and Mr. *Keene*, in support of the demurrer. To constitute a valid agreement there must be a simple acceptance of the terms proposed. *Holland v. Eyre*.⁴¹ The plaintiff, instead of accepting the alleged proposal for sale for £1,000 on the 6th of June, rejected it, and made a counter proposal; this put an end to the defendant's offer, and left the proposal of the plaintiff alone under discussion; that has never been accepted, and the plaintiff could not, without the concurrence of the defendant, revive the defendant's original proposal.

Mr. *Pemberton* and Mr. *Freeling*, contra. So long as the offer of the defendant subsisted, it was competent to the plaintiff to accept it; the bill charges that the defendant's offer had not been withdrawn previous to its acceptance by the plaintiff; there therefore exists a valid subsisting contract. *Kennedy v. Lee*,⁴² *Johnson v. King*,⁴³ were cited.

THE MASTER OF THE ROLLS. Under the circumstances stated in this bill, I think there exists no valid binding contract between the parties for the purchase of the property. The defendant offered to sell it for £1,000, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract; instead of that, the plaintiff made an offer of his own to purchase the property for £950, and he thereby rejected the offer pre-

⁴¹ 2 Sim. & St. 194.

⁴² 3 Mer. 454.

⁴³ 2 Bing. 270.

viously made by the defendant.⁴⁴ We think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it; and that therefore there exists no obligation of any sort between the parties; the demurrer must be allowed.⁴⁵

SANDERS *v.* POTTLITZER BROS. FRUIT CO.

144 NEW YORK, 209.—1894.

Action by Archie D. Sanders and others against Pottlitzer Bros. Fruit Company for damages for breach of a contract of sale. From a judgment of the general term affirming a judgment in favor of defendant, plaintiffs appeal.

O'BRIEN, J. The plaintiffs in this action sought to recover damages for the breach of a contract for the sale and delivery of a quantity of apples. The complaint was dismissed by the referee, and his judgment was affirmed upon appeal. The only question to be considered is whether the contract stated in the complaint, as the basis for damages, was ever in fact made, so as to become binding upon the parties. On the 28th of October, 1891, the plaintiffs submitted to the defendant the following proposition in writing:

“BUFFALO, N. Y., Oct. 28, 1891.

“Messrs. Pottlitzer Bros. Fruit Co., Lafayette, Ind.—

“Gentlemen: We offer you ten car loads of apples, to be from 175 to 200 barrels per car, put up in good order, from stock inspected by your Mr. Leo Pottlitzer at Nunda and Silver Springs. The apples not to exceed one-half green fruit, balance red fruit, to be shipped as follows: First car between 1st and 15th December, 1891; second car between 15th and 30th December, 1891; and one car each ten days after January 1, 1892, until all are shipped. Dates above specified to be considered as approximate a few days either way, at the price of \$2.00 per barrel, free on board cars at Silver Springs and Nunda, in refrigerator cars; this proposition to be accepted not later than the 31st inst., and you to pay us \$500 upon

⁴⁴ Lord Langdale.—Ed.

⁴⁵ *National Bank v. Hall*, 101 U. S. 43, 50; *Minneapolis, &c. Ry. Co. v. Columbus Rolling Mills*, 119 U. S. 149; *Ortman v. Weaver*, 11 Fed. Rep. 358; *W. & H. M. Goulding Co. v. Hammond*, 54 Fed. Rep. 639 (C. C. A.); *Baker v. Johnson Co.*, 37 Ia. 186, 189; *Cartmel v. Newton*, 79 Ind. 1, 8; *Fox v. Turner*, 1 Ill. App. 153; *Egger v. Nesbitt*, 122 Mo. 667; *Harris v. Scott*, 67 N. H. 437; *Russell v. Falls Mfg. Co.*, 106 Wis. 329, *acc.*

acceptance of the proposition, to be deducted from the purchase price of apples at the rate of \$100 per car on the last five cars.

“Yours respectfully,

“J. SANDERS & SON.”

To this proposition the defendant replied by telegraph on October 31, as follows:

“LAFAYETTE, IND., 31st October.

“J. Sanders & Son:

“We accept your proposition on apples, provided you will change it to read car every eight days from January first, none in December; wire acceptance.

“POTTLITZER BROS. FRUIT CO.”

On the same day the plaintiffs replied to this dispatch, to the effect that they could not accept the modification proposed, but must insist upon the original offer. On the same day the defendant answered the plaintiffs' telegram as follows:

“Can only accept condition as stated in last message. Only way we can accept. Answer if accepted. Mail contract, and we will then forward draft.

“POTTLITZER BROS. FRUIT CO.”

The matter thus rested till November 4th, when the plaintiffs received the following letter from the defendant:

“LAFAYETTE, IND., November 2, 1891.

“J. Sanders & Son, Stafford, N. Y.—

“Gents: We are in receipt of your telegrams, also your favor of the 31st ult. While we no doubt think we have offered you a fair contract on apples, still the dictator of this has learned on his return home that there are so many near-by apples coming into market that it will affect the sales of apples in December, and therefore we do not think it advisable to take the contract unless you made it read for shipment from the 1st of January. We are very sorry you cannot do this, but perhaps we will be able to take some fruit from you, as we will need it in the spring. If you can change the contract so as to read as we wired you we will accept it and forward you draft in payment on same.

“POTTLITZER BROS. FRUIT CO.”

On receipt of this letter the plaintiffs sent the following message to the defendant by telegraph:

“November 4th.

“Pottlitzer Brothers Fruit Company, Lafayette, Ind.—

“Letter received. Will accept conditions. If satisfactory, answer, and will forward contract.

“J. SANDERS & SON.”

The defendant replied to this message by telegraph saying:

“All right. Send contract as stated in our message.”

The plaintiffs did prepare and send on the contract precisely in the terms embraced in the foregoing correspondence, which was the original proposition made by the plaintiffs, as modified by defendant's telegram above set forth, and which was acceded to by the plaintiffs. This was not satisfactory to the defendant, and it returned it to the plaintiffs with certain modifications, which were not referred to in the correspondence. These modifications were: (1) That the fruit should be well protected from frost and well hayed; (2) that if, in the judgment of the plaintiffs, it was necessary or prudent that the cars should be fired through, the plaintiffs should furnish the stoves for the purpose, and the defendant pay the expense of the man to be employed in looking after the fires to be kept in the cars; (3) that the plaintiffs should line the cars in which the fruit was shipped. These conditions were more burdensome, and rendered the contract less profitable to the plaintiffs. They were not expressed in the correspondence, and I think cannot be implied. They were not assented to by the plaintiffs, and on their declining to incorporate them in the paper the defendant treated the negotiations as at an end and notified the plaintiffs that it had placed its order with other parties. There was some further correspondence, but it is not material to the question presented by the appeal.

The writings and telegrams that passed between the parties contain all the elements of a complete contract. Nothing was wanting in the plaintiffs' original proposition but the defendant's assent to it in order to constitute a contract binding upon both parties according to its terms. This assent was given upon condition that a certain specified modification was accepted. The plaintiffs finally assented to the modification, and called upon the defendant to signify its assent again to the whole arrangement as thus modified, and it replied that it was “all right,” which must be taken as conclusive evidence that the minds of the parties had met and agreed upon certain specified and distinct obligations which were to be observed by both.

It is true, as found by the learned referee, that the parties intended that the agreement should be formally expressed in a single paper, which, when signed, should be the evidence of what had already been agreed upon. But neither party was entitled to insert

in the paper any material condition not referred to in the correspondence, and if it was inserted without the consent of the other party it was unauthorized. Hence the defendant, by insisting upon further material conditions, not expressed or implied in the correspondence, defeated the intention to reduce the agreement to the form of a single paper signed by both parties. The plaintiffs then had the right to fall back upon their written proposition, as originally made, and the subsequent letters and telegrams; and, if they constituted a contract of themselves, the absence of the formal agreement contemplated was not, under the circumstances, material.

When the parties intend that a mere verbal agreement shall be finally reduced to writing, as the evidence of the terms of the contract, it may be true that nothing is binding upon either party until the writing is executed. But here the contract was already in writing, and it was none the less obligatory upon both parties because they intended that it should be put into another form, especially when their intention is made impossible by the act of one or the other of the parties by insisting upon the insertion of conditions and provisions not contemplated or embraced in the correspondence. *Vassar v. Camp*, 11 N. Y. 441; *Brown v. Norton*, 50 Hun. 248; *Pratt v. Railroad Co.*, 21 N. Y. 308. The principle that governs in such cases was clearly stated by Judge Selden in the case last cited, in these words: "A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is, in all respects, as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by the other; that the terms of this contract were in all respects definitely understood and agreed upon, and that a part of the mutual understanding was that a written contract embodying these terms should be drawn and executed by the respective parties—this is an obligatory contract, which neither party is at liberty to refuse to perform."

In this case it is apparent that the minds of the parties met, through the correspondence, upon all the terms, as well as the subject-matter, of the contract, and that the subsequent failure to reduce this contract to the precise form intended, for the reason stated, did not affect the obligations of either party, which had already attached, and they may now resort to the primary evidence of their mutual stipulations. Any other rule would always permit

a party who has entered into a contract like this, through letters and telegraphic messages, to violate it whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where, by changes in the market, or other events occurring subsequent to the written negotiations, it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business. A stipulation to reduce a valid written contract to some other form cannot be used for the purpose of imposing upon either party additional burdens or obligations, or of evading the performance of those things which the parties have mutually agreed upon by such means as made the promise or assent binding in law. There was no proof of any custom existing between the shippers and consignees of such property in regard to the payment of the expense of firing, lining, and haying the cars. If it be said that such precautions are necessary in order to protect the property while in transit, that does not help the defendant. The question still remains, who was to bear the expense? The plaintiffs had not agreed to pay it, any more than they had agreed to pay the freight or incur the other expenses of transportation. The plaintiffs sent a plain proposition which the defendant accepted without any such conditions as it subsequently sought to attach to it. That the parties intended to make and sign a final paper does not warrant the inference that they also intended to make another and different agreement. The defendant is in no better position than it would be in case it had refused to sign the final writing without alleging any reasons whatever.

The principle, therefore, which is involved in the case, is this: Can parties who have exchanged letters and telegrams with a view to an agreement, and have arrived at a point where a clear and definite proposition is made on the one side and accepted on the other, with an understanding that the agreement shall be expressed in a formal writing, ever be bound until that writing is signed? If they are at liberty to repudiate the proposition or acceptance, as the case may be, at any time before the paper is signed, and as the market may go up or down, then this case is well decided. But if, at the close of the correspondence, the plaintiffs became bound by their offer, and the defendant by its acceptance of that offer, whether the final writing was signed or not, as I think they did, under such circumstances as the record discloses, then

the conclusion of the learned referee was erroneous. To allow either party to repudiate the obligations clearly expressed in the correspondence, unless the other will assent to material conditions, not before referred to, or to be implied from the transaction, would be introducing an element of confusion and uncertainty into the law of contract. If the parties did not become bound in this case, they cannot be bound in any case until the writing is executed.

The judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, except EARL, GRAY and BARTLETT, JJ., dissenting.

Judgment reversed.

An offer may lapse or be revoked.

EDWARD WHEAT AND OTHERS *v.* LEMUEL CROSS.

MARYLAND COURT OF APPEALS, APRIL TERM, 1869.

(Reported in 31 Maryland, 99.)

BARTOL, C. J., delivered the opinion of the Court.

This suit was brought by the appellee to recover the price of a horse sold to the appellants.

The plaintiff resided in Frostberg, and the defendants were engaged in the business of buying and selling horses in Baltimore. The contract of sale was made by correspondence between the parties through the mails.

The facts of the case, so far as it is material to state them, were as follows: On the 23d of August, 1867, the defendants received the horse into their possession, to be sold on commission, at that time apparently sound and in good condition. On the 12th of September, 1867, they addressed a letter to the plaintiff, stating that the horse had been sick, but is doing well at this time, and offering \$140 for him clear of all expenses, and saying, "you can draw on us at sight for \$140." This letter was received on the 15th or 16th of September; on the 16th the plaintiff signified his acceptance of the offer by drawing on the defendants for \$140. The draft was sent on that day, and on the 17th the defendants refusing to pay the draft, it was protested.

On the 16th of September, the defendants addressed a letter to the plaintiff withdrawing their offer of the 12th, stating that "when they wrote they did not think the horse was so bad, but since it has

turned out to be 'farcy,' they would not buy at any price," and directing him "not to draw on them for the money, that they will not pay the draft until they see how the horse gets." This letter was not received by the plaintiff until after he had accepted the offer contained in the letter of the 12th, by sending the draft.

In the argument of the case two positions have been taken by the defence—

1st. That there was not such mutual assent between the parties as to constitute a binding contract.

2d. That the offer by the defendants was made through mistake of a material fact as to the condition of the horse, and the nature of the disease under which it was suffering; and was withdrawn as soon as the mistake was discovered, and the acceptance thereof was not binding upon them.⁴⁶

1st. On the first question, we consider the law well settled that where parties are at a distance from each other, and treat by correspondence through the post, an offer made by one is a continuing offer until it is received, and its acceptance then completes the *aggregatio mentium* necessary to make a binding bargain. The bargain is complete as soon as the letter is sent containing notice of acceptance. This rule applies where the offer and acceptance are unconditional.

The offer may be withdrawn, and the withdrawal thereof is effectual so soon as the notice thereof reaches the other party; but if before that time the offer is accepted, the party making the offer is bound, and the withdrawal thereafter is too late.

In this case it appears the defendants' letter of withdrawal was sent on the same day on which the notice of the plaintiff's acceptance of their previous offer was transmitted, and it has been argued that the *onus* is on the plaintiff to show that the sending of the acceptance preceded the sending of the letter of withdrawal. This position is not correct; it is quite immaterial to inquire whether the defendants' letter of the 16th, or the draft of the same date, was first sent.

Until the notice of the withdrawal of the offer actually reached the plaintiff, the offer was continuing, and the acceptance thereof completed the contract.

This point was expressly decided in *Tayloe v. Merchants' Fire Ins. Co.*, 9 Howard, 390. That was a case arising upon an insurance contract, but the reasoning of the Court on this question, and the

⁴⁶ Part of the opinion, holding the mistake immaterial, is omitted.

principles decided, are applicable alike to all contracts made by correspondence between parties at a distance from each other. There the terms upon which the company was willing to insure were made known by letter, and it was held "that the contract was complete when the insured placed a letter in the postoffice accepting the terms."

Lapse by death.

PRATT *v.* TRUSTEES.

93 ILLINOIS, 475.—1879.

Action of notes. Plaintiff had judgment below.

SCHOLFIELD, J. Appellees obtained judgment in the county court of Kane County against Mary L. Pratt, as administratrix of the estate of Philemon B. Pratt, deceased, on two promissory notes, executed by the deceased to the appellees on the 6th of July, 1871—one for \$300, payable one year after date, and the other for the sum of \$327.50, payable two years after date, and both bearing interest at the rate of ten per cent per annum. Appeal was taken from that judgment to the Circuit Court of Kane County, where the cause was again tried at its October term, 1876, resulting, as before, in a judgment in favor of appellees for the amount of the notes, principal and interest. Mary L. Pratt, administratrix, appeals from that judgment, and brings the rulings of the Circuit Court before us for review.

The defense interposed to the notes is, that they were executed without any valid consideration.

* * * * *

The question to be considered is, did Pratt's death revoke the promise expressed in the notes, no money having been expended, or labor bestowed, or liability of any kind incurred, prior to his death, upon the faith of that promise?

The purpose in giving the notes was to enable the church represented by appellees to purchase a bell. The cost of a bell of a particular size, etc., was estimated by Pratt, and he gave his notes for the amount of the estimate, intending that when the notes were paid the money should be devoted to paying for such a bell; and when the notes matured, at Pratt's suggestion to let them stand, because, as he alleged, bell metal was getting cheaper, and

they would thereby be enabled to procure a larger bell, no effort was made to collect the notes, and they were permitted to remain just as they were; but there was no undertaking on the part of appellees nor the church which they represent to procure a bell, and there is no proof of any act done, or liability incurred by appellees, or any one else, in reliance upon these notes, before the death of Pratt. It is shown that the bell has been procured, and probably there is evidence sufficient to show that this has been done on the faith of those notes, but it appears with a reasonable certainty that this has been since Pratt's death. If a contract therefor was made in Pratt's life-time, the record unfortunately does not show it. Collection of the notes cannot be enforced as a promise to make a gift. *Pope v. Dodson*, 58 Ill. 360; *Blanchard v. Williamson*, 70 Id. 652. Where notes are given by way of voluntary subscription, to raise a fund or promote an object, they are open to the defense of a want of consideration, unless money has been expended, or liabilities incurred, which, by a legal necessity, must cause loss or injury to the person so expending money, or incurring liability, if the notes are not paid. 1 Pars. on Bills and Notes, 202; 1 Pars. on Cont. 377 *et seq.*

And so it has been held that the payee of a promissory note given to him in the expectation of his performing service, but without any contract binding him to serve, cannot maintain an action upon it. *Hulse v. Hulse*, 17 C. B. 711; 84 Eng. Com. Law, 709.

In the absence of any one claiming rights as a *bona fide* assignee before maturity, it is not perceived that promissory notes, executed as these were, are, in any material respect, different from an ordinary subscription whereby the subscriber agrees under his hand, to pay so much in aid of a church, school, etc., where there is no corresponding undertaking by the payee.

The promise stands as a mere offer, and may, by necessary consequence, be revoked any time before it is acted upon. It is the expending of money, etc., or incurring of legal liability, on the faith of the promise, which gives the right of action, and without this there is no right of action. *McClure v. Wilson*, 43 Ill. 356, and cases there cited; *Trustees v. Garvey*, 53 Id. 401; S. C., 5 Am. Rep. 51; *Baptist Education Soc. v. Carter*, 72 Id. 247.

Being but an offer, and susceptible of revocation at any time before being acted upon, it must follow that the death of the promisor, before the offer is acted upon, is a revocation of the offer. This is clearly so upon principle. The subscription or

note is held to be a mere offer until acted upon, because until then there is no mutuality. The continuance of an offer is in the nature of its constant repetition, which necessarily requires some one capable of making a repetition. Obviously this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man.

If the payees named in the notes may be held agents of the promisor, with power to contract for work to be done and money expended upon the faith of the notes, the case of *Campanari v. Woodburn* (15 C. B. 400; 80 Eng. Com. Law, 400) is directly in point, and holds that the death of the promisor was a revocation of the agency. In that case the plaintiff alleged that it was agreed between him and the defendant's intestate that he should endeavor to sell a certain picture, and that if he succeeded the intestate should pay him 100 pounds; that he did so endeavor while the testator was alive, and through the efforts then made was enabled to effect a sale after the testator's death, but that the defendant had refused to pay 100 pounds. The count was held not to show a cause of action. Jervis, C. J., said that if the testator had countermanded the sale, he clearly would not have been liable for commissions, although the plaintiff might have recovered for services already rendered and charges and expenses previously incurred. *A fortiori* the defendant was not responsible when the revocation proceeded from the act of God.

An analogous case is *Michigan State Bank v. Leavenworth* (2 Williams [Vt.], 209), where it was held that the operation of a letter of credit was confined to the life of the writer, and that no recovery can be had upon it for goods sold or advances made after his death.

The question that has been raised, in some cases, whether a party acting in good faith upon the belief that the principal is alive, may recover, does not arise here, as there is nothing in the evidence to authorize the inference that the bell here was purchased under the belief that Pratt was still alive.

We are of the opinion, on the record before us, the judgment below was unauthorized. It must therefore be reversed and the cause remanded.

Judgment reversed.⁴⁷

⁴⁷ Accord: *Twenty-Third St. Bap. Ch. v. Cornell*, 117 N. Y. 601. Cf. *Cottage Street Church v. Kendall*, 121 Mass. 528. For a similar case of revocation by insanity, see *Beach v. First M. E. Church*, 96 Ill. 177.

Lapse by failure to accept in manner prescribed.ELIASON *et al.* v. HENSHAW.

4 WHEATON (U. S.), 225.—1819.

Error to the Circuit Court for the District of Columbia.

WASHINGTON, J. This is an action, brought by the defendant in error, to recover damages for the non-performance of an agreement, alleged to have been entered into by the plaintiffs in error, for the purchase of a quantity of flour, at a stipulated price. The evidence of this contract, given in the court below, is stated in a bill of exceptions, and is to the following effect:

A letter from the plaintiffs to the defendant, dated the 10th of February, 1813, in which they say: "Capt. Conn informs us that you have a quantity of flour to dispose of. We are in the practice of purchasing flour at all times, in Georgetown, and will be glad to serve you, either in receiving your flour in store, when the markets are dull, and disposing of it, when the markets will answer to advantage, or we will purchase at market price, when delivered; if you are disposed to engage two or three hundred barrels at present, we will give you \$9.50 per barrel, deliverable the first water, in Georgetown, or any service we can. If you should want an advance, please write us by mail, and will send you part of the money in advance." In a postscript they add, "Please write by return of wagon, whether you accept our offer." This letter was sent from the house at which the writer then was, about two miles from Harper's Ferry, to the defendant, at his mill, at Mill Creek, distant about twenty miles from Harper's Ferry, by a wagoner then employed by the defendant to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the defendant, on the 14th of the same month, to which an answer, dated the succeeding day, was written by the defendant, addressed to the plaintiffs, at Georgetown, and dispatched by a mail which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says: "Your favor of the 10th inst. was handed me by Mr. Chenoweth last evening. I take the earliest opportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown, by the first

water, at \$9.50 per barrel, I accept; shall send on the flour by the first boats that pass down from where my flour is stored on the river; as to any advance, will be unnecessary—payment on delivery is all that is required.”

On the 25th of the same month, the plaintiffs addressed to the defendant an answer to the above, dated at Georgetown, in which they acknowledge the receipt of it, and add: “Not having heard from you before, had quite given over the expectation of getting your flour; more particularly, as we requested an answer by return of wagon the next day, and as we did not get it, had bought all we wanted.” The wagoner, by whom the plaintiffs’ first letter was sent, informed them, when he received it, that he should not probably return to Harper’s Ferry, and he did not, in fact, return in the defendant’s employ. The flour was sent down to Georgetown some time in March, and the delivery of it to the plaintiffs was regularly tendered and refused.

Upon this evidence, the defendants in the court below, the plaintiffs in error, moved that court to instruct the jury, that if they believed the said evidence to be true, as stated, the plaintiff in this action was not entitled to recover the amount of the price of the 300 barrels of flour, at the rate of \$9.50 per barrel. The court being divided in opinion, the instruction prayed for was not given. The question is, whether the court below ought to have given the instruction to the jury, as the same was prayed for? If they ought, the judgment, which was in favor of the plaintiff in that court, must be reversed.

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another, imposes no obligation upon the former until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.

In this case, the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown, by the first water, and to pay for the same \$9.50 per barrel. To the letter containing this offer, they required an answer by the return of the wagon, by which the letter was dispatched. This wagon was at that time in the service of the defendant, and employed by him in hauling flour from his mill to

Harper's Ferry, near to which place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate by the usual length of time which was employed by this wagon in traveling from Harper's Ferry to Mill Creek and back again with a load of flour, about what time they should receive the desired answer, and therefore it was entirely unimportant whether it was sent by that or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent, constituted an essential part of the plaintiffs' offer.

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiffs at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing. It is no argument, that an answer was received at Georgetown; the plaintiffs in error had a right to dictate the terms upon which they would purchase the flour, and unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstance of place, and they were the only judges of its importance. There was, therefore, no contract concluded between these parties, and the court ought, therefore, to have given the instruction to the jury, which was asked for.

Judgment reversed, and cause remanded, with directions to award a *venire facias de novo*.⁴³

⁴³ For lapse by conditional acceptance, see *Minneapolis, etc. Ry. v. Columbus Rolling Mill*, 119 U. S. 149.

Lapse by expiration of time.MACLAY *v.* HARVEY.

90 ILLINOIS, 525.—1878.

SCHOLFIELD, J. Appellant brought assumpsit against appellee in the court below, on an alleged contract whereby the latter employed the former to take charge of the millinery department of his store in Monmouth, in this State, for the season commencing in April and ending in July, in the year 1876, and to pay her therefor \$15 per week.

The judgment was in favor of the appellee, and appellant now assigns numerous errors as grounds for its reversal.

In our opinion, the case may be properly disposed of by the consideration of a single question. Appellant's right of recovery is based entirely upon an alleged special contract, and unless there was such a contract the judgment below is right, however erroneous may have been the rulings under which it was obtained.

After some preliminary correspondence, which is not before us, appellant, who was then residing in Peoria, received from appellee the following, by mail:

“MONMOUTH, ILL., March 9, 1876.

“Miss L. Maclay, Peoria, Ill.: I have been trying to find your address for some time, and was informed last evening that you were in Peoria. I write to inquire if you intend to work at millinery this season, and if you have made any arrangements or not. If you have not, can you take charge of my stock this season? And if we can agree, I would want you for a permanent trimmer.

“Please notify me by return mail, and terms, and we can confer further.

“Yours in haste,

“JOHN HARVEY.”

“Formerly Jno. Harvey & Co., when you trimmed for me.”

Appellant's reply to this is not before us. She says she stated her terms in it, and thereafter appellee wrote her the following, which she also received by mail:

“MONMOUTH, ILL., March 21, 1876.

“Miss L. Maclay, Peoria, Ill.: Your favor was received in due time, and contents noted. You spoke of wages at \$15 per week, and fare one way. You will want to go to Chicago, I presume, and trim a week or ten days.

“I would like for you to trim at H. W. Wetherell's or at Keith Bros. I will give you \$15 per week and pay your fare from Chicago to Monmouth,

and pay you the above wages for your actual time here in the house at that rate per season.

"I presume that the wholesale men will allow you for your time in the house. You will confer a favor by giving me your answer by return mail.

"Yours,

"JOHN HARVEY."

Appellant says she received this in the afternoon, and replied the next day by postal card, addressed to appellee, at Monmouth, as follows:

"PEORIA, March 23.

"Mr. Harvey: Yours was promptly received, and I will go up to Chicago next week, and when my services are required you will let me know.

"Very respectfully,

"L. MACLAY."

Appellant did not place this in the post-office herself, but she says she gave it to a boy who did errands about the house of her sister, with whom she was then staying, directing him to place it in the office. The postmark on the card, which is shown to be always placed on mail matter the same day it is put in the office, shows that the card was not mailed until the 25th of March.

Appellee receiving no reply from appellant, on Monday morning, March 27, went to Peoria and endeavored to engage another milliner, and failing in this, endeavored to find appellant, but was unable to do so, and then returned to Monmouth, when he received the appellant's postal card, which had come to the office there during his absence. On Wednesday night of the same week appellee left Monmouth for Chicago, arriving at the last-named place on the following Thursday, March 30. Finding that the appellant was neither at Keith Bros. nor at Wetherell's, he proceeded to employ another milliner, and on the same day, and before leaving Chicago, wrote and mailed a letter directed to appellant's address at Peoria, notifying her of that fact, but this letter, in consequence of appellant's absence from Peoria, she did not receive for some time afterward.

The millinery season commences from the 5th to the 10th of April and ends from the 20th of June to the 4th of July, as shown by the evidence. Appellee had not laid in his spring stock when he was corresponding with appellant, and he started to New York, from Chicago, for that purpose, on the evening of the day on which he addressed the letter to appellant notifying appellant of his employment of another milliner, the evening of the 30th of

March. Appellant says she left Peoria for Chicago on Friday, which must have been the 31st of March. On arriving at Chicago she went to Wetherell's, and failing to get employment there, did not go to Keith Bros., but went to another house in the same line of business, where she remained some days, and on the 8th of April she notified appellee, by letter, that she was sufficiently informed as to the "new ideas of trimming" and was ready to enter his service. Appellee replied to this, reciting the disappointments he claimed to have met with on her account, and again notifying her that he did not require her services.

If a contract was consummated between the parties, it was by the mailing of appellant's postal card on the 25th of March. Appellee's letter of the 21st cannot be regarded as the consummation of a contract, because it restates the terms with some variation, though it may be but slight, and requires an acceptance upon the terms thus stated. This, until unequivocally accepted, was only a mere proposition or offer. *Hough v. Brown*, 19 N. Y. 111.

It was said by the Lord Chancellor in *Dunlop v. Higgins* (1 H. L. Cas. 387):

"Where an individual makes an offer by post, stipulating for, or by the nature of the business having the right to expect, an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it. When a person seeks to acquire a right, he is bound to act with a degree of strictness, such as may not be required where he is only endeavoring to excuse himself from a liability."

This is regarded as a leading case on the question of acceptance of contract by letter, and the language quoted we regard as a clear and accurate statement of the law, as applicable to the present case. It is clear here that the nature of the business demanded a prompt answer, and the words, "you will confer a favor by giving me your answer by return mail," do, in effect, "stipulate" for an answer by return mail. *Taylor v. Rennie*, 35 Barb. 272. The evidence shows that there were two daily mails between Peoria and Monmouth, one arriving at Monmouth at 11 o'clock A. M., and the other at 6 o'clock P. M., and it did not require more than one day's time between the points. Appellee's letter to appellant making the offers, it will be remembered, bears date March 21st. Assuming the date of the appellant's postal card (which, she says, was written on the morning after she received appellee's letter)

to be correct, she received appellant's letter on the evening of the 22d. Appellee was, therefore, entitled to expect a reply mailed on the 23d, which he ought to have received on that day, or at farthest, by the morning of the 24th; but appellant's reply was not mailed until the 25th. It does not relieve appellant of fault that she gave the postal card to a boy on the 23d, to have him mail it. Her duty was not to place an answer in private hands, but in the post-office. The boy was her agent, not that of the appellee, and his negligence in mailing the postal card was her negligence.

The question whether it would not have equally subverted appellee's object had he treated the postal card of appellant as the consummation of a contract is irrelevant. Appellant seeks to recover upon the strict letter of a special contract, and it is therefore incumbent upon her to prove such contract. It is required of her, as we have seen, to prove an acceptance of appellee's offer within the time to which it was limited—that is to say, by the placing in the post-office of an answer unequivocally accepting the offer in time for the return mail, which she did not do. Appellee was therefore under no obligation to regard the contract as closed. He might, it is true, have done so, but he was not legally bound in that respect, nor was he legally bound to notify appellant that her acceptance had not been signified within the time to which his offer was limited. She is legally chargeable with knowledge that her acceptance was not in time, and in order to fix a liability thereby upon the appellee, it was incumbent upon her, before assuming that appellee waived this objection, to ascertain that he in fact did so.

Appellee was led by the postal card of appellant to believe that he would, when he arrived at Chicago on Thursday, find her either at Wetherell's or at Keith Bros. Had he done so, it was his intention to treat the contract as closed; but she was not there, and this intention was not acted upon, and so it is to be considered as if it had never existed. Appellee, not finding appellant at Wetherell's or Keith Bros., as she had led him to believe he would, had no reason to assume that she was, in good faith, acting upon the assumption that her postal card had closed the contract, and he cannot therefore be held estopped from denying that it was not posted in time. In view of the lateness of the season and the danger to appellee's business from delay, of all which appellant

was aware, it cannot be said appellee acted with undue haste in engaging another milliner. The judgment is affirmed.

Judgment affirmed.

DICKEY, J., dissented.

MINNESOTA OIL CO. *v.* COLLIER & CO.

4 DILLON (U. S. C. C.), 431.—1876.

Action for oil sold by plaintiff to defendant. Defendant sets up counter-claim for damages for non-delivery of oil bought of plaintiff.

Defendant's counter-claim rests on these facts. On July 31st, plaintiff offered defendant by telegraph a quantity of oil at fifty-eight cents. The telegram was sent on Saturday, but was not delivered to defendant until Monday, August 2d, between eight and nine o'clock. On Tuesday, August 3d, about nine o'clock, defendant deposited a telegram accepting the offer. Later in the day, plaintiff sent defendant a telegram withdrawing the offer of July 31st, but defendant replied that sale was effected, and inquired when shipment would follow.

It appeared that the market was very much unsettled, and that the price of oil was subject to sudden fluctuations during the month previous, and at the time of this negotiation, varying from day to day, and ranging between fifty-five and seventy-five cents per gallon.

It is urged by the defendant that the dispatch of Tuesday, August 3, 1875, accepting the offer of the plaintiff transmitted July 31st, and delivered Monday morning, August 2d, concluded a contract for the sale of the twelve thousand four hundred and fifty gallons of oil.

The plaintiff, on the contrary, claims, first, that the dispatch accepting the proposition made July 31st was not received until after the offer had been withdrawn; second, that the acceptance of the offer was not in due time, that the delay was unreasonable, and therefore no contract was completed.

NELSON, J. It is well settled by the authorities in this country, and sustained by the later English decisions, that there is

no difference in the rules governing the negotiation of contracts by correspondence through the post-office and by telegraph, and a contract is concluded when an acceptance of a proposition is deposited in the telegraph-office for transmission. See Am. Law Reg. Vol. 14, No. 7, 401, "Contracts by Telegraph," article by Judge Redfield, and authorities cited; also *Trevor v. Wood*, 36 N. Y. 307.

The reason for this rule is well stated in *Adams v. Lindsell* (1 Barn. & Ald. 681). The negotiation in that case was by post. The court said, "that if a bargain could not be closed by letter before the answer was received, no contract could be completed through the medium of the post-office; that if the one party was not bound by his offer when it was accepted (that is, at the time the letter of acceptance is deposited in the mail), then the other party ought not to be bound until after they had received a notification that the answer had been received and assented to, and that it might so go on *ad infinitum*." See also 5 Pa. St. 339; 11 N. Y. 441; *Mactier v. Frith*, 6 Wend. 103; 48 N. H. 14; 8 English Common Bench, 225. In the case at bar the delivery of the message at the telegraph-office signified the acceptance of the offer. If any contract was entered into, the meeting of minds was at 8:53 of the clock on Tuesday morning, August 3d, and the subsequent dispatches are out of the case. 1 Parsons on Contracts, 482, 483.

This rule is not strenuously dissented from on the argument, and it is substantially admitted that the acceptance of an offer by letter or by telegraph completes the contract, when such acceptance is put in the proper and usual way of being communicated by the agency employed to carry it; and that when an offer is made by telegraph, an acceptance by telegraph takes effect when the dispatch containing the acceptance is deposited for transmission in the telegraph-office, and not when it is received by the other party. Conceding this, there remains only one question to decide, which will determine the issues: Was the acceptance of defendant deposited in the telegraph-office Tuesday, August 3d, within a reasonable time, so as to consummate a contract binding upon the plaintiff?

It is undoubtedly the rule that when a proposition is made under the circumstances in this case, an acceptance concludes the contract if the offer is still open, and the mutual consent necessary to convert the offer of one party into a binding con-

tract by the acceptance of the other is established if such acceptance is within a reasonable time after the offer was received.

The better opinion is, that what is, or is not, a reasonable time, must depend upon the circumstances attending the negotiation, and the character of the subject-matter of the contract, and in no better way can the intention of the parties be determined. If the negotiation is in respect to an article stable in price, there is not so much reason for an immediate acceptance of the offer, and the same rule would not apply as in a case where the negotiation related to an article subject to sudden and great fluctuations in the market.

The rule in regard to the length of the time an offer shall continue, and when an acceptance completes the contract, is laid down in *Parsons on Contracts* (Vol. 1, p. 482). He says: "It may be said that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern. If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated; and the law will decide this to be that time which, as rational men, they ought to have understood each other to have had in mind." Applying this rule, it seems clear that the intention of the plaintiff, in making the offer by telegraph, to sell an article which fluctuates so much in price, must have been upon the understanding that the acceptance, if at all, should be immediate, and as soon after the receipt of the offer as would give a fair opportunity for consideration. The delay here was too long, and manifestly unjust to the plaintiff, for it afforded the defendant an opportunity to take advantage of a change in the market, and accept or refuse the offer as would best subserve its interests.

Judgment will be entered in favor of the plaintiff for the amount claimed. The counter-claim is denied.

Judgment accordingly.

An offer may be revoked at any time before acceptance.

HENTHORN *v.* FRASER.

IN THE CHANCERY DIVISION, COURT OF APPEAL,
MARCH 3, 26, 1892.

(Reported in (1892) 2 Chancery, 27.)

In 1891 the plaintiff was desirous of purchasing from the Huskisson Benefit Building Society certain houses in Flamank Street, Birkenhead. In May he, at the office of the society in Chapel Street, Liverpool, signed a memorandum drawn up by the secretary, offering £600 for the property, which offer was declined by the directors; and on the 1st of July he made in the same way an offer of £700, which was also declined. On the 7th of July he again called at the office, and the secretary verbally offered to sell to him for £750. This offer was reduced into writing, and was as follows:—

“I hereby give you the refusal of the Flamank Street property at £750 for fourteen days.”

The secretary, after signing this, handed it to the plaintiff, who took it away with him for consideration.

On the morning of the 8th another person called at the office and offered £760 for the property, which was accepted, and a contract for purchase signed, subject to a condition for avoiding it if the society found that they could not withdraw from the offer to the plaintiff.

Between 12 and 1 o'clock on that day the secretary posted to the plaintiff, who resided in Birkenhead, the following letter:

“Please take notice that my letter to you of the 7th instant, giving you the option of purchasing the property, Flamank Street, Birkenhead, for £750, in fourteen days, is withdrawn, and the offer cancelled.”

This letter, it appeared, was delivered at the plaintiff's address between 5 and 6 in the evening; but, as he was out, did not reach his hands till about 8 o'clock.

On the same 8th of July the plaintiff's solicitor, by the plaintiff's direction, wrote to the secretary as follows:

“I am instructed by Mr. James Henthorn to write to you, and accept your offer to sell the property, 1 to 17 Flamank Street, Birkenhead, at the price of £750. Kindly have contract prepared and forwarded to me.”

This letter was addressed to the society's office, and was posted in Birkenhead at 3:30 P. M., was delivered at 8:30 P. M., after the closing of the office, and was received by the secretary on the following morning. The secretary replied, stating that the society's offer had been withdrawn.

The plaintiff brought this action in the Court of the County Palatine for specific performance. The VICE-CHANCELLOR dismissed the action, and the plaintiff appealed.

Farwell, Q. C., and T. R. *Hughes*, for the appeal.

Neville, Q. C., and P. O. *Lawrence*, for the defendant:

We insist that the Vice-Chancellor has drawn a correct inference,—that there was no authority to accept by post; and if that be so, the acceptance will not date from the posting. *Dunlop v. Higgins*, 1 H. L. C. 381, went on the ground that it was the understanding of both parties that an answer should be sent by post. In *Brogden v. Metropolitan Railway Company*, Lord Blackburn puts it on the ground “that where it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post the letter the offer is accepted.” It would be very inconvenient to hold the post admissible in all cases. Here, Liverpool and Birkenhead are at such a short distance from each other that it cannot be considered that the plaintiff had an authority to reply by post. If the offer had been sent by post that would, no doubt, be held to give an authority to reply by post; but the offer was delivered by hand to the plaintiff, who was in the habit of calling at the defendant's office, and lived only at a short distance, so that authority to reply by post cannot be inferred. The post is not prohibited; the acceptance may be sent in any way; but, unless sending it by post was authorized, it is inoperative till it is received. Suppose, immediately after posting the acceptance, the plaintiff had gone to the office and retracted it, surely he would have been free.

(LORD HERSCHELL.—It is not clear that he would, after sending an acceptance in such a way that he could not prevent its reaching the other party. Possibly a case where the question is as to the date from which an acceptance which has been received is operative may not stand on precisely the same footing as one where the question is whether the person making the offer is bound, though the acceptance has never been received at all. More

evidence of authority to accept by post may be required in the latter case than in the former.)

Dickinson v. Dodds, 2 Ch. D. 463, shows that a binding contract to sell to another person may be made while an offer is pending, and that it will be a withdrawal of the offer.

(LORD HERSCHELL.—In that case the person to whom the offer was made knew of the sale before he sent his acceptance.)

Farwell, in reply.

1892, March 26. LORD HERSCHELL.⁴⁹ If the acceptance by the plaintiff of the defendant's offer is to be treated as complete at the time the letter containing it was posted, I can entertain no doubt that the society's attempted revocation of the offer was wholly ineffectual. I think that a person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn. This seems to me to be in accordance with the reasoning of the Court of King's Bench in the case of *Adams v. Lindsell*, 1 B. & Al. 681, which was approved by the LORD CHANCELLOR in *Dunlop v. Higgins*, 1 H. L. C. 381, 399, and also with the opinion of Lord Justice Mellish in Harris's case, Law Rep. 7 Ch. 587. The very point was decided in the case of *Byrne v. Van Tienhoven*, 5 C. P. D. 344, by Lord Justice Lindley, and his decision was subsequently followed by Mr. Justice Lush. The grounds upon which it has been held that the acceptance of an offer is complete when it is posted have, I think, no application to the revocation or modification of an offer. These can be no more effectual than the offer itself, unless brought to the mind of the person to whom the offer is made. But it is contended on behalf of the defendants that the acceptance was complete only when received by them, and not on the letter being posted. It cannot, of course, be denied, after the decision in *Dunlop v. Higgins*, 1 H. L. C. 381, in the House of Lords, that, where an offer has been made through the medium of the post, the contract is complete as soon as the acceptance of the offer is posted, but that decision is said to be inapplicable here, inasmuch as the letter containing the offer was not sent by post to Birkenhead, but handed to the plaintiff in the defendant's office at Liverpool. The question therefore arises in what circumstances

⁴⁹ Lord Herschell's restatement of the case is omitted. The concurring opinions of Lindley, L. J., and Kay, L. J., are also omitted.

the acceptance of an offer is to be regarded as complete as soon as it is posted. In the case of the *Household Fire and Carriage Accident Insurance Company v. Grant*, 4 Ex. D. 216, LORD Justice Baggallay said (ibid. 227): "I think that the principle established in *Dunlop v. Higgins* is limited in its application to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized." And in the same case Lord Justice Thesiger based his judgment, 4 Ex. D. 218, on the defendant having made an application for shares under circumstances "from which it must be implied that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post." The facts of that case were that the defendant had, in Swansea, where he resided, handed a letter of application to an agent of the company, their place of business being situate in London. It was from these circumstances that the Lords Justices implied an authority to the company to accept the defendant's offer to take shares through the medium of the post. Applying the law thus laid down by the Court of Appeal, I think in the present case an authority to accept by post must be implied. Although the plaintiff received the offer at the defendants' office in Liverpool, he resided in another town, and it must have been in contemplation that he would take the offer, which by its terms was to remain open for some days, with him to his place of residence, and those who made the offer must have known that it would be according to the ordinary usages of mankind that if he accepted it he should communicate his acceptance by means of the post. I am not sure that I should myself have regarded the doctrine that an acceptance is complete as soon as the letter containing it is posted as resting upon an implied authority by the person making the offer to the person receiving it to accept by those means. It strikes me as somewhat artificial to speak of the person to whom the offer is made as having the implied authority of the other party to send his acceptance by post. He needs no authority to transmit the acceptance through any particular channel; he may select what means he pleases, the post-office no less than any other. The only effect of the supposed authority is to make the acceptance complete as soon as it is posted, and authority will obviously be implied only when the tribunal considers that it is a case in which this result ought to be reached. I

should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communication the acceptance of an offer, the acceptance is complete as soon as it is posted.⁵⁰ It matters not in which way the proposition be stated, the present case is in either view within it. The learned Vice-Chancellor appears to have based his decision to some extent on the fact that before the acceptance was posted the defendants had sold the property to another person. The case of *Dickinson v. Dodds*, 2 Ch. D. 463, was relied upon in support of that defense. In that case, however, the plaintiff knew of the subsequent sale before he accepted the offer, which, in my judgment, distinguishes it entirely from the present case. For the reasons I have given, I think the judgment must be reversed, and the usual decree for specific performance made. The respondents must pay the costs of the appeal and of the action.

An offer is made irrevocable by acceptance.

COOPER v. LANSING WHEEL COMPANY.

94 MICHIGAN, 272.—1892.

Assumpsit. Defendant demurred to the declaration and the demurrer was sustained. Plaintiffs bring error.

MONTGOMERY, J. This is an appeal from a judgment sustaining a demurrer to plaintiffs' declaration.

The first count of the declaration alleges an agreement "whereby the said defendant did undertake, promise, and agree, to and with the plaintiffs, to furnish, sell, and deliver to said plaintiffs all such number or quantity of wheels, at and for an agreed

⁵⁰ In *Perry v. Mt. Hope Iron Co.*, 15 R. I. 380, an offer made in Boston in conversation was to "stand until the next day." The plaintiff telegraphed an acceptance from Providence. It was held that the contract was completed in Rhode Island. "If there be any question that the telegraph is a natural and ordinary mode of transmitting such an acceptance, that is a question of fact for the jury; but we are of opinion that if it be shown that the acceptance duly reached the defendant, the question of the mode, no mode having been specified, is immaterial." See also *Wilcox v. Cline*, 70 Mich. 517.

price, as said plaintiffs should or might require or want, during the season of the year 1890, in their said business of manufacturing;" that during the season of 1890 plaintiffs agreed to order, and did order, of defendant, all of such wheels as they might or should want or require in their said business; that certain orders so given were filled, and that certain other orders given in November and December, 1890, defendant refused to fill.

The second count sets forth a written agreement, which is as follows:

"OWOSSO, MICH., Dec. 16, 1889.

"MESS. LANSING WHEEL Co., Lansing, Mich.

"*Gentlemen:* Please enter our order for what wheels we may want during the season of 1890, at following prices and terms: B, \$6; C, \$5; D, \$4 per set, f. o. b. Owosso, thirty days. All the wheels to be good stock, and smooth. Should we want a few D wheels to be extra nice stock, all selected white, they are to be furnished at same price, not to exceed 10 set in a 100.

"Very respectfully yours,

"OWOSSO CART Co."

Upon receipt of this instrument, defendant indorsed thereon the following: "Accepted. Lansing Wheel Co." Then follow the allegations as to the giving and filling of certain orders, and the refusal to fill certain other orders which were given.

The defendant demurred to this declaration, the substantial ground of demurrer being that there was no mutuality of contract between the parties.

It was early held in England that a proposition to sell goods at a certain specified price, and to give the offeree a stated time in which to accept or reject the offer, did not make a binding contract which could not be withdrawn before acceptance. See *Cooke v. Oxley*, 3 Term R. 653. The doctrine of this case has not, however, remained unchallenged. Mr. Story, in his work on Sales, expresses the opinion that the rule is unjust and inequitable. Section 127. He contends that the grant of time to accept the offer is not made without consideration. He suggests as one sufficient legal consideration the expectation or hope of the offerer, and further suggests that the making of such an offer might betray the other party into a loss of time and money, by inducing him to make examination, and to inquire into the value of the goods offered, and this inconvenience assumed by him is a sufficient consideration for the offer.

There is much force in this reasoning, but it has not prevailed

to abate the doctrine of *Cooke v. Oxley* further than this: That it is now generally held that if a proposition be made, to be accepted within a given time, it constitutes a continuing offer, which, however, may be retracted at any time. But if, at any time before it is retracted, it is accepted, such offer and acceptance constitute a valid contract. It was therefore within the power of defendant, in the present case, on the authority of the cases cited, to withdraw the offer made at any time before the plaintiffs had acted upon it.

Authorities may be found which go further than this. The case of *Bailey v. Austrian* (19 Minn. 535) holds that a contract by which defendant agreed to supply plaintiffs with all the pig iron wanted by them in their business until December 31 next ensuing, at specified prices, and the plaintiffs simultaneously promised to purchase of defendant all of the iron which they might want in their said business during the time mentioned, at said prices, is not a mutual contract which can be enforced, on the ground that the plaintiffs did not engage to want any quantity whatever. The same court, in *Tarbox v. Gotzian* (20 Minn. 139) reaffirm this doctrine.

In *Keller v. Ybarru* (3 Cal. 147) plaintiff counted upon an agreement by the defendant, whereby he undertook to sell and deliver to the plaintiff so many of the grapes then growing in his vineyard as the plaintiff should wish to take, for which the plaintiff agreed to pay the defendant 10 cents per pound on delivery. The plaintiff averred that he subsequently notified the defendant that he wished to take 1900 pounds of grapes, and tendered the \$190 in payment therefor, and requested the defendant to deliver such grapes to the plaintiff, but defendant refused to deliver the same, or any part thereof. The court held that this agreement, when first entered into, amounted to an offer upon the part of defendant, which the plaintiff had a right to accept or reject, and the defendant to retract at any time before acceptance; but that, when the plaintiff named the quantity of grapes which he desired to take under the offer of defendant, the contract was complete, and both parties were bound by it. Substantially the same doctrine was held in *Smith v. Morse*, 20 La. Ann. 220.

In *Railroad Co. v. Bartlett* (3 Cush. 224) it was held that a proposition in writing to sell land at a certain price, if taken within 30 days, is a continuing offer, which may be retracted at

any time; but if, not being retracted, it is accepted within the time, such offer and acceptance constitute a valid contract.

So it is generally held that in suits upon unilateral contracts, if the defendant has had the benefit of the consideration for which he bargained, he can be held bound. *Jones v. Robinson*, 17 Law J. Exch. 36; *Mills v. Blackall*, 11 Q. B. 358; *Morton v. Burn*, 7 Adol. & E. 19; *Kennaway v. Treleavan*, 5 Mees. & W. 498; *Richardson v. Hardwick*, 106 U. S. 255.

If it be held, as we think the correct doctrine is, that an offer to furnish such goods as the plaintiff may want within a stated time may, upon acceptance by the offeree before withdrawal, constitute a valid contract, it is difficult to see why, if the offeree orders any portion of the goods, and the offerer has the benefit of the sale, the entire contract may not become valid and binding. This certainly would constitute a sufficient consideration. If in the present case the defendant had, in consideration of the present sale and delivery to the plaintiffs of one lot of wheels at a stated price, and for which the defendant received its pay, further agreed to furnish such further quantity of wheels as the plaintiffs might desire during the season, it would seem that a purchase of the one lot, as offered, would afford a sufficient consideration for defendant's undertaking. This view is adopted in England.

In Bishop on Contracts, section 78, it is said:

"Where it is admitted that there is nothing for A's promise to rest on but B's promise, if B has not promised, A's promise rests on nothing, and is void. There may be cases in seeming contradiction to this. If there are any really so, they are not to be followed. In one case, parties agreed that one of them should supply the other during a designated period with certain stores, as the latter might order. He made an order, which was filled; then made another, which was declined; and, on suit brought, the defendant rested his case on the lack of mutuality in the contract, which, he contended, rendered it void. Plainly it stood in law as a mere continuing offer by the defendant; but when the plaintiff made an order, he thereby accepted the offer to the extent of the order, and it was too late for the other to recede. So judgment went for the plaintiff.

See *Railway Co. v. Witham*, L. R. 9 C. P. 16. We think the doctrine of this case is sound, and that it should control the present case.

Judgment should be reversed, with costs, and defendant given leave to plead over.

The other Justices concurred.⁵¹

⁵¹ Accord: *Wells v. Alexander*, 130 N. Y. 642; *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427.

An offer need not be made to a known person, but no contract can arise until it has been accepted by a known person.

FITCH *v.* SNEDAKER.

38 NEW YORK, 248.—1868.

WOODRUFF, J. On the 14th of October, 1859, the defendant caused a notice to be published, offering a reward of two hundred dollars . . . "to any person or persons who will give such information as shall lead to the apprehension and conviction of the person or persons guilty of the murder of" a certain unknown female.

On the 15th day of October, before the plaintiffs had seen or heard of the offer of this reward, one Fee was arrested and put in jail, and though not in terms so stated, the case warrants the inference, that, by means of the evidence given by the plaintiffs on his trial and their efforts to procure testimony, Fee was convicted.

This action is brought to recover the reward so offered. On the trial the plaintiffs proved the publication of the notice, and then proposed to prove that they gave information before the notice was known to them, which led to the arrest of Fee. This evidence was excluded. The plaintiffs then offered to prove, that, with a view to this reward, they spent time and money, made disclosures to the district attorney, to the grand jury and to the court on the trial after Fee was in jail, and that, without their effort, evidence, and exertion, no indictment or conviction could have been had. This evidence was excluded.

The court thereupon directed a nonsuit.

It is entirely clear that, in order to entitle any person to the reward offered in this case, he must give such information as shall lead to both apprehension and conviction. That is, both must happen, and happen as a consequence of the information given. No person could claim the reward whose information caused the apprehension, until conviction followed; both are conditions precedent. No one could therefore claim the reward, who gave no information whatever until after the apprehension, although the information he afterward gave was the evidence upon which conviction was had, and, however clear, that, had the information been concealed or suppressed, there could have been no

conviction. This is according to the plain terms of the offer of the reward, and is held in *Jones v. The Phoenix Bank*, 8 N. Y. 228; *Thatcher v. England*, 3 Com. Bench, 254.

In the last case it was distinctly held, that, under an offer of reward, payable "on recovery of property stolen and conviction of the offender," a person who was active in arresting the thief and finding and restoring part of the stolen property, giving information to the magistrates, tracing to London other of the property and producing pawnbrokers with whom the prisoner had pledged it, and who incurred much trouble and expense in bringing together witnesses for the prosecution, was not entitled to the reward, as it appeared that another person gave the first information as to the party committing the robbery.

In the present case, the plaintiff, after the advertisement of the defendant's offer of a reward came to his knowledge, did nothing toward procuring the arrest, nor which led thereto, for at that time Fee had already been arrested.

The cases above referred to, therefore, establish that, if no information came from the plaintiffs which led to the arrest of Fee, the plaintiffs are not entitled to recover, however much the information they subsequently gave, and the efforts they made to procure evidence, may have contributed to or even have caused his conviction, and, therefore, evidence that it was their efforts and information which led to his conviction was wholly immaterial, if they did not prove that they had given information which led to his apprehension, and was properly rejected.

The question in this case is simple. A murderer having been arrested and imprisoned in consequence of information given by the plaintiff before he is aware that a reward is offered for such apprehension, is he entitled to claim the reward in case conviction follows?

The ruling on the trial, excluding all evidence of information given by the plaintiffs before they heard of this reward, necessarily answers this question in the negative.

The case of *Williams v. Carwardine* (4 Barn. & Adol. 621), and same case at the assizes (5 Carr. & Payne, 566), holds that a person who gives information according to the terms of an offered reward is entitled to the money, although it distinctly appeared that the informer had suppressed the information for five months, and was led to inform, not by the promised reward, but by other motives. The court said the plaintiff had proved performance of

the condition upon which the money was payable and that established her title. That the court would not look into her motives. It does not appear by the reports of this case whether or not the plaintiff had ever seen the notice or handbill posted by the defendant, offering the reward; it does not, therefore, reach the precise point involved in the present appeal.

I perceive, however, no reason for applying to an offer of reward for the apprehension of a criminal any other rules than are applicable to any other offer by one, accepted or acted upon by another, and so relied upon as constituting a contract.

The form of action in all such cases is *assumpsit*. The defendant is proceeded against as upon his contract to pay, and the first question is, was there a contract between the parties?

To the existence of a contract there must be mutual assent, or in another form offer and consent to the offer. The *motive* inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How then can there be consent or assent to that of which the party has never heard? On the 15th day of October, 1859, the murderer, Fee, had, in consequence of information given by the plaintiffs, been apprehended and lodged in jail. But the plaintiffs did not, in giving that information, manifest any assent to the defendant's offer, nor act in any sense in reliance thereon, they did not know of its existence. The information was voluntary, and in every sense (material to this case) gratuitous. The offer could only operate upon the plaintiffs after they heard of it. It was *prospective* to those who will, in the future, give information, etc.

An offer cannot become a contract unless acted upon or assented to.

Such is the elementary rule in defining what is essential to a contract. *Chitty on Con.* (5th Am. ed.), Perkins' notes, p. 10, 9, and 2, and cases cited. Nothing was here done to procure or lead to Fee's apprehension in view of this reward. Indeed, if we were at liberty to look at the evidence on the first trial, it would appear that Fee was arrested before the defendant offered the reward.

I think the evidence was properly excluded and the nonsuit necessarily followed.

The judgment should be affirmed.

Judgment affirmed.⁵²

⁵² Accord: *Howland v. Lounds*, 51 N. Y. 604; *Stamper v. Temple*, 6 Humph. (Tenn.) 113.

SHUEY, EXECUTOR, *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1875.

(Reported in 92 United States, 73.)

Appeal from the Court of Claims.

Henry B. Ste. Marie filed his petition in the Court of Claims to recover the sum of \$15,000, being the balance alleged to be due him of the reward of \$25,000 offered by the Secretary of War, on the 20th of April, 1865, for the apprehension of John H. Surratt, one of Booth's alleged accomplices in the murder of President Lincoln.

The court below found the facts as follows:

1. On the 20th April, 1865, the Secretary of War issued, and caused to be published in the public newspapers and otherwise, a proclamation, whereby he announced that there would be paid by the War Department "for the apprehension of John H. Surratt, one of Booth's accomplices," \$25,000 reward, and also that "liberal rewards will be paid for any information that shall conduce to the arrest of either of the above-named criminals or their accomplices;" and such proclamation was not limited in terms to any specific period, and it was signed "Edwin M. Stanton, Secretary of War." On the 14th November, 1865, the President caused to be published his order revoking the reward offered for the arrest of John H. Surratt. 13 Stat. 778.

2. In April, 1866, John H. Surratt was a zouave in the military service of the Papal government, and the claimant was also a zouave in the same service. During the month he communicated to Mr. King, the American minister at Rome, the fact that he had discovered and identified Surratt, who had confessed to him his participation in the plot against the life of President Lincoln. The claimant also subsequently communicated further information to the same effect, and kept watch, at the request of the American minister, over Surratt. Thereupon certain diplomatic correspondence passed between the government of the United States and the Papal government relative to the arrest and extradition of Surratt; and on the 6th November, 1866, the Papal government, at the request of the United States, ordered the arrest of Surratt, and that he be brought to Rome, he then being at Veroli. Under this order of the Papal government, Surratt was arrested; but, at the moment of leaving prison at Veroli, he escaped from the guard having him in custody, and, crossing the frontier of the Papal ter-

ritory, embarked at Naples, and escaped to Alexandria in Egypt. Immediately after his escape, and both before and after his embarkation at Naples, the American minister at Rome, being informed of the escape by the Papal government, took measures to trace and rearrest him, which was done in Alexandria. From that place he was subsequently conveyed by the American government to the United States; but the American minister, having previously procured the discharge of the claimant from the Papal military service, sent him forward to Alexandria to identify Surratt. At the time of the first interview between the claimant and the American minister, and at all subsequent times until the final capture of Surratt, they were ignorant of the fact that the reward offered by the Secretary of War for his arrest had been revoked by the President. The discovery and arrest of Surratt were due entirely to the disclosures made by the claimant to the American minister at Rome; but the arrest was not made by the claimant, either at Veroli, or subsequently at Alexandria.

3. There has been paid to the claimant by the defendants, under the act of 27th July, 1868 (15 Stat. 234, sect. 3), the sum of \$10,000. Such payment was made by a draft on the treasury payable to the order of the claimant, which draft was by him duly indorsed.

The Court found as a matter of law that the claimant's service, as set forth in the foregoing finding did not constitute an arrest of Surratt within the meaning of the proclamation, but was merely the giving of information which conduced to the arrest. For such information the remuneration allowed to him under the act of Congress was a full satisfaction, and discharges the defendants from all liability.

The petition was dismissed accordingly: whereupon an appeal was taken to this Court.

Ste. Marie having died *pendente lite*, his executor was substituted in his stead.

Mr. D. B. Meany and Mr. F. Carroll Brewster, for the appellant.

Mr. Assistant Attorney-General Edwin B. Smith, contra.

Mr. JUSTICE STRONG delivered the opinion of the Court.

We agree with the Court of Claims, that the service rendered by the plaintiff's testator was, not the apprehension of John H. Surratt, for which the War Department had offered a reward of \$25,000, but giving information that conduced to the arrest.

These are quite distinct things, though one may have been a consequence of the other. The proclamation of the Secretary of War treated them as different; and, while a reward of \$25,000 was offered for the apprehension, the offer for information was only a "liberal reward." The findings of the Court of Claims also exhibit a clear distinction between making the arrest and giving the information that led to it. It is found as a fact, that the arrest was not made by the claimant, though the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is, that Surratt's apprehension was a consequence of the disclosures made. But the consequences of a man's act are not his acts. Between the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest,—persons who were not his agents, and who themselves were entitled to the proffered reward for his arrest, if any persons were. We think, therefore, that at most the claimant was entitled to the "liberal reward" promised for information conducing to the arrest; and that reward he has received.

But, if this were not so, the judgment given by the Court of Claims is correct.

The offer of a reward for the apprehension of Surratt was revoked on the twenty-fourth day of November, 1865; and notice of the revocation was published. It is not to be doubted that the offer was revocable at any time before it was accepted, and before anything had been done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made.

Judgment affirmed.⁵³

⁵³ See also *Hudson Real Estate Co. v. Tower*, 161 Mass. 10.

VITTY *v.* ELEY.

51 N. Y. APPELLATE DIVISION, 44.—1900.

Appeal by the plaintiff, John Vitty, from a judgment of the County Court of Niagara county in favor of the defendant, entered in the office of the clerk of the county of Niagara on the 9th day of December, 1899, affirming the judgment of a justice of the peace.

SPRING, J. The defendant is trustee of a school district in the town of Lockport. In January, 1899, the schoolhouse in this district was broken into by one Joe White and a quantity of property stolen therefrom or destroyed. The trustee, probably by authority of the citizens of the district, although his authority is not in question, offered a reward of twenty-five dollars "for the arrest and conviction of the party or parties" who perpetrated the crime. The evidence shows that White and the plaintiff lived together and were cronies. White, after breaking into the schoolhouse in the night, returned to the plaintiff's house bringing with him chalk, flags, window-catches and other stuff which he had taken from the schoolhouse. He also had two chickens, evidently stolen, which were eaten in the household. The plaintiff saw White burn two of these flags and secrete the other stuff under a board of the floor. White told the plaintiff not to "say anything about this." The testimony, therefore, shows that the plaintiff knew that White had stolen this stuff. Later on, after the reward and with notice of it, he testified that he told the bartender in the saloon of Mahar & Byrnes that Joe White broke into the schoolhouse; that Peter Hayes, who was working up the case, was called in from the back room, and the plaintiff then voluntarily told him what he had seen, incriminating White. Hayes contradicted the plaintiff and said he was called from the back room and the following occurred: "I said, 'I want you to come up to the sheriff's office and make a statement as to what you know about breaking into this schoolhouse.' He says, 'I don't know anything about it; I was home in bed the night the schoolhouse was broken into.' I said, 'From what I hear, either you or Joe or both of you went into that schoolhouse.' He said, 'I didn't go in there.' I said, 'If you don't come up to the sheriff's office and tell what you know about it, I will swear out a warrant against you.' He said that if he told

what he knew about it, he would have no place to stay. I said, 'I will find you a place to stay, come with me,' and we went to the courthouse and called the sheriff out. I said, 'This man will make a statement.' We went into a side room. He said about what he testified this forenoon." If his version of the transaction is correct, the plaintiff did not voluntarily give up the information with the expectation of obtaining the reward, but it was extorted from him through fear that he might be arrested himself for complicity with White.

There is considerable contrariety in the decisions as to the real basis of the right to a reward. It, however, seems to be settled in this State that it is in the nature of a contract inuring to the benefit of the person who gives the information. A few principles out of the conflicting cases I think may be stated, although there is no uniformity among them.

1. The information must be given with knowledge of the reward. *Fitch v. Snedaker*, 38 N. Y. 248; *Howland v. Lounds*, 51 Id. 604.

I think the evidence warrants the conclusion that plaintiff knew of the reward, although that is a little shadowy, for apparently he could not read.

2. As I have suggested, it is a contract obligation. This being so, it must be the voluntary giving up of the information by the person. If corkscrewed out of him by threats inducing fear of prosecution, I take it no recovery could be had. That would destroy the contract element. In the early English case of *Williams v. Carwardine* (4 Barn. & Ald. 621) the question of the motive was held to be unimportant, but the text writers and American authorities do not seem to have followed this doctrine strictly, although I find no case in this State distinctly overruling it. That case cannot be good law if the liability is contractual, as assent and a voluntary surrender of the information would be essential.

3. The authorities hold that the information must be imparted with a view to obtaining the reward. 18 Ency. of Pl. & Pr. 1155; *Hewitt v. Anderson*,⁵⁴ 56 Cal. 476. And in *Howland v. Lounds*

⁵⁴ In *Hewitt v. Anderson* (56 Cal. 476) the court says: "The plaintiff, on the trial, testified that he did do the acts upon which he bases his claim to the reward with a view to obtaining it. On the other hand, there was evidence introduced by the defendants which tended to prove that the plaintiff had stated, under oath, that he had not expected any reward. In view

(*supra*) the court says at page 609: "That a party claiming a reward of this character must give some information or do something having some reference to the reward offered, is very obvious. The action is, in fact, upon contract. Where a contract is proposed to all the world, in the form of a proposition, any party may assent to it and it is binding, but he cannot assent without knowledge of the proposition."

In the present case the plaintiff does not claim that there was any talk between him and Hayes to the effect that he expected the reward. The information given by the plaintiff was undoubtedly valuable, and even essential to secure the conviction of White. The justice, however, on conflicting evidence, or upon inferences properly deducible from the evidence, has decided adversely to the plaintiff. This decision implies that he reached the conclusion that the information was imparted through fear of arrest, or without any expectation of receiving the reward. The conclusion is supported by the proofs, and we are not inclined to interfere with the disposition of the case made by the justice.

The judgment is affirmed, with costs to the respondent. All concurred.

Judgment affirmed, with costs.

of that conflict, we would not disturb a finding either way. And we are satisfied that under that finding the plaintiff cannot recover in this action. If he did not do the acts upon which he now bases his right to recover, with the intention of claiming the reward in the event of his accomplishing what would entitle him to it, he cannot recover it. If he had not known that a reward had been offered, he might, upon the authority of some cases, recover. But we are not aware of any case in which it has been held that a party, after disclaiming any intention to claim a reward, could recover it."

ENGINEERING CASES: EXCERPTS FROM DECISIONS.

ACCEPTANCE.

The acceptance of an offer and the creation of a contract may be found in the entry of an order on the books of a firm. *Camden Iron Works v. Fox*, 34 Fed. Rep. 200.

If a contractor is requested to perform work and furnish materials, or if he furnishes them without request and the owner takes possession and enjoys the benefits of them, the law will imply a contract to pay for them. *Richard v. Stanton*, 16 Wend. (N. Y.) 25.

An offer was made to sell a certain amount of tin at a certain price. The reply was: "We accept your offer if full weight plates." Held: that this acceptance did not create a contract because of the condition inserted in the reply. *Kirwin v. Byrne*, 27 N. Y. Supp. 143.

A reply to an offer in which the offeror says: "I am prepared to make the arrangements with you on the terms you name," would not be an unconditional acceptance. *Havens v. American Fire Ins. Co.*, 39 N. E. Rep. 40.

A railroad company offered to carry logs at a certain rate, the consignor to chain the logs if necessary for safety. The rate was accepted. The court held that the acceptance of the rate without comment amounted to the acceptance of all the conditions of the offer. *Lawrence v. Milwaukee, etc., R. R. Co.*, 54 N. W. Rep. 797.

A proposal to do work according to plans and specifications, together with an unqualified acceptance by a city have been held to constitute a contract of which the plans and specifications were a part. *Wiles v. Hoss* (Ind.), 16 N. E. Rep. 800.

It has been held that the acceptance of a legally made bid for a proposed building does not in itself constitute a contract, but that the bidder is entitled to a contract in accordance with the term of his proposal. *Hughes v. Clyde*, 41 Ohio St. 339.

An acceptance made "subject to the execution of a contract to be prepared," or "subject to the preparation and approval of a formal contract," will not take effect until it has been executed. *Winn v. Bull*, L. R. 7 Ch. Div. 29.

An acceptance "subject to the conditions and regulations of a

contract to be substituted for this memorandum," will not take effect until formally executed. *Walter v. Walther*, 24 N. Y. Supp. 307.

REVOCATION.

Title to the materials cannot be acquired by both offeree and purchaser, but as against the seller they can both acquire the right to the goods, together with the alternative right to damages, which is all that a contract secures to the contractor in any case. *Langdell's Summary of Contracts*, 1091.

In the case of a specific chattel where the title passes immediately upon the acceptance of the offer, doubtless the person who first completes his contract with the seller will get title to the goods, and may retain possession of them; but when the offer is to sell real property or unspecified personal property, it may be doubted whether a subsequent sale of the property, whether executed or executory, would have any effect upon the contract created by accepting the offer. *Langdell's Summary of Contracts*, 1091.

Where a dealer in materials agrees with a contractor in consideration of \$1 that he shall have the refusal of certain materials for one month for \$5,000, the law supposes the dealer to offer the materials to the contractor for \$5,000, and that the offer shall continue for one month. If the dealer revoke the offer, then he is liable for the damages the contractor suffers in consequence, which would probably be the difference between the price agreed upon and the market price. *Langdell's Summary of Contracts*, 1090.

SECTION II.

CONSIDERATION.

The parties have been brought together by the offer and acceptance; the intent to contract has been shown. The law further requires that this mutual assent be reinforced by still another act, that of the giving of consideration. This doctrine is peculiar to the jurisdictions where the English Common Law prevails and is, we might almost say, universally required in all contracts not under seal. It prevents the making of a simple promise as a gift. If the instrument is not a deed, the giving of consideration is an essential element, even if the law has specified a particular form for the contract.

Consideration is in general a benefit to the party promising, or a detriment to the party to whom the promise is made.

It is not absolutely necessary that the consideration be a benefit to the promisor, nor a detriment to the promisee provided the promisee furnishes something sufficient in law, which he is under no legal obligation to furnish and which the promisor desires in exchange for his promise. The later authorities agree that the detriment to the promisee is the test rather than the benefit to the promisor.

It must be given in respect of the promise, since it gives to the promise a binding force.¹

We may now lay down some general rules governing consideration:

I. It is necessary to the validity of every promise not under seal.

II. It need not be adequate to the promise, but must be of some value in the eye of the law.

III. It must be legal.

IV. It must be either present or future, it cannot be past.

Anson, Contr. 89.

(I) *Its Necessity.*

1. A simple contract is not valid unless consideration is given.² To this general rule we may state two exceptions:

(a) The promise in a gratuitous service, while not enforceable, holds the promisor to reasonable care in carrying it out.

(b) The promise in negotiable instruments—specialties—such as bills of exchange and promissory notes, may be enforced though there be no consideration.

(II) *Its Value.*

1. The consideration need not be equivalent in value to the promise, but must have some value.³

2. If the consideration is merely inadequate the contract will still be enforced.⁴

¹ *Cook v. Bradley*, 7 Conn. 57.

² *Burnet v. Bisco*, 4 Johns (N. Y.) 235; *Conover v. Stillwell*, 34 N. J. L. 54; *Hess's Estate*, 150 Pa. St. 346.

³ *Devecmon v. Shaw*, 69 Md. 199; *Brooks v. Ball*, 18 Johns. (N. Y.) 337; *Hamer v. Sidway*, 124 N. Y. 538; *Lawrence v. McCalmont*, 2 How. (U. S.) 426; *Churchill v. Bradley*, 58 Vt. 403; *Wolford v. Powers*, 85 Ind. 294.

⁴ *Hall v. Perkins*, 3 Wend. (N. Y.) 626; *Ready v. Noakes*, 29 N. J. Eq. 497; *Erwin v. Parham*, 12 How. (U. S.) 197.

3. A promise is a good consideration for another promise.⁵
4. The consideration must be real; it must not be a promise to do an impossible thing.⁶
5. The consideration must move from the promisee.
6. Moral consideration is not legal consideration. A person may desire to pay the debts of his friend, but the simple satisfaction of paying the debts, unaccompanied by any other benefit to the promisor or detriment to the promisee, is not deemed in law a good consideration.⁷

7. Doing that which a person is already legally bound to do is no consideration for a promise; the consideration is not real.⁸ Likewise is a promise to do that which a person cannot legally do.⁹

X and Y made a contract, X to do certain work and Y to pay for the same. If, when X refuses to do the work, Y promises to pay him an additional sum to carry it out, we may take four views of the situation.

(a) That there is no consideration for Y's promise; X is only doing that which he has already contracted to do.¹⁰

(b) That X has a choice, to carry out the contract or abandon it and pay damages. The foregoing of this choice being regarded as the consideration to the promise of the extra payment.¹¹

(c) That the act of making a second contract rescinds the first contract.¹²

(d) That the second contract is a separate one. X may sue Y on his promise in the second contract, and Y may sue X on his promise in the first.¹³

⁵ *Coleman v. Eyre*, 45 N. Y. 38; *Philpot v. Gruninger*, 14 Wal. 570; *Thayer v. Allison*, 109 Ill. 180; *Cook v. Murphy*, 70 Ill. 96.

⁶ *Beebe v. Johnson*, 19 Wend. (N. Y.) 500; *Stevens v. Coon*, 1 Phinney (Wis.) 356; *Merrill v. Parker*, 80 Ia. 542; *Clifford v. Watts*, L. R. 5. C. P. 588; *The Harriman*, 9 Wal. 172.

⁷ *Mills v. Wyman*, 3 Pick. (Mass.) 207; *Cook v. Bradley*, 7 Conn. 57; *Whitaker v. Whitaker*, 52 N. Y. 368; *Fink v. Cox*, 18 Johns. 145; *Kennedy v. Ware*, 1 Pa. St. 445; *Kirkpatrick v. Taylor*, 43 Ill. 207.

⁸ *Tolhurst v. Powers*, 133 N. Y. 460; *Smith v. Whilden*, 10 Pa. St. 39; *Hennessey v. Hill*, 52 Ill. 281; *Voorhees v. Reed*, 17 Ill. App. 21, 24; *Stubes v. Schack*, 83 Ill. 191.

⁹ *McCaleb v. Price*, 12 Ala. 753; *Harvey v. Gibbons*, 2 Lev. 161.

¹⁰ *Lingenfelder v. Wainwright Brew. Co.*, 103 Mo. 578.

¹¹ *Monroe v. Perkins*, 9 Pick. (Mass.) 298; *Connelly v. Devoe*, 37 Conn. 576.

¹² *Coyner v. Lynde*, 10 Ind. 282; *Stewart v. Keteltas*, 36 N. Y. 388.

¹³ *Endriss v. Belle Isle Co.*, 49 Mich. 229.

8. The payment of a sum smaller than the amount due is not a valid discharge of a debt.¹⁴ If one thing is given in place of another for the consideration of a promise, it must be a different thing, not a smaller amount of the same thing.

9. Forbearance to sue, even for a short time, has been held to be a good consideration for an assignment of title, providing there is a right of action and a real defendant in existence.¹⁵

The matter of a compromise comes under this heading. It is really an exception to the general rule of consideration. The court looks upon it with favor, however, for the reason that it tends to decrease litigation. The party being sued, if he thinks he has a good defence, makes a compromise; he will be held to its terms. The plaintiff must, however, be acting in good faith;¹⁶ if his conduct is fraudulent, the defendant cannot be bound by the compromise.¹⁷

10. When a contract is executory and the mutual promises are yet unfulfilled, the parties may agree to release each other, the discharge of one being the consideration for the discharge of the other.¹⁸ But if the contract is partly executed, that is, if one party has fulfilled his promise while the other has not, the first cannot release the second by mere consent as there is no consideration for the promise; a new agreement is essential and the promise must be under seal.¹⁹

(III) Its Legality.

1. The consideration must be a legal one.²⁰
2. If one or more promises are supported by a single consideration, any part of which is illegal, the contract is void.²¹

¹⁴ *Jaffray v. Davis*, 124 N. Y. 164.

¹⁵ *Mulholland v. Bartlett*, 74 Ill. 58; *Pennsylvania Coal Co. v. Blake*, 85 N. Y. 226; *Palfrey v. Portland R.*, 4 Allen (Mass.) 55; *Liverenz v. Haines*, 32 Ill. 357; *St. Clair v. Perrine*, 75 Ill. 366.

¹⁶ *White v. Hoyt*, 73 N. Y. 505; *Gates v. Shutts*, 7 Mich. 127; *Headley v. Hackley*, 50 Mich. 43.

¹⁷ *Parker v. Enslow*, 102 Ill. 272; *Northern, &c., v. Kelly*, 113 U. S. 199; *Russell v. Cook*, 3 Hill (N. Y.) 504; *Grandin v. Grandin*, 49 N. J. L. 508; *Bellows v. Sowles*, 57 Vt. 164; *Feeter v. Weber*, 78 N. Y. 334; *McKinley v. Watkins*, 13 Ill. 140; *Honeyman v. Jarvis*, 79 Ill. 318.

¹⁸ *Cutter v. Cochrane*, 116 Mass. 408.

¹⁹ *Collver v. Moulton*, 9 R. I. 90; *Bender v. Been*, 78 Ia. 283.

²⁰ *Boigneres v. Bouion*, 54 Cal. 146.

²¹ *Bishop v. Palmer*, 146 Mass. 469; *Ricketts v. Harvey*, 106 Ind. 564; *Tobey v. Robinson*, 99 Ill. 222; *Henderson v. Palmer*, 71 Ill. 579. 582

3. If a single promise is supported by one or more considerations, any part of which is illegal, the agreement fails.²²

4. If there are two promises,²³ or two parts of one promise,²⁴ one legal and the other illegal, given for a good consideration, the legal promise or the legal part of the promise holds, but not the other.

(IV) *Its Time of Existence.*

1. The consideration must be in the executed or executory form, that is, present or future, but not past. If the consideration is executory, then it is a promise given for a promise; if executed, then it is an act given for a promise.

2. A past consideration confers no benefit on the promisor, and is no detriment to the promisee; it is, in fact, no consideration at all;²⁵ it is purely gratuitous.

To the above rule there are several exceptions which are not of great importance.

(a) A past consideration will support a subsequent promise, if the consideration was given at the request of the promisor, and if that request implied a recompense.²⁶

(b) Where one person voluntarily does that which another was legally bound to do, and the other person afterwards, in consideration thereof, expressly promises, he will be bound by such a promise.²⁷

(c) In the cases in which a person has been capable of reviving an agreement by which he has benefited, although, by rules of law since repealed, by incapacity to contract no longer existing, or by mere lapse of time, the agreement is not enforceable against

²² *Widoe v. Webb*, 20 Ohio St. 431; *Perkins v. Cummings*, 2 Gray, 258; *Trist v. Child*, 21 Wal. 441; *Filson's Trustees v. Himes*, 5 Pa. St. 452.

²³ *Erie Ry. Co. v. Union, &c., Co.*, 35 N. J. L. 240; *Gelpcke v. Dubuque*, 1 Wal. 222; *United States v. Hodson*, 10 Wal. 408; *United States v. Mora*, 97 U. S. 422; *United States v. Bradley*, 10 Pet. 360.

²⁴ *Hanauer v. Gray*, 25 Ark. 350.

²⁵ *Dearborn v. Bowman*, 3 Met. (Mass.) 155; *Mills v. Wyman*, 3 Pick. (Mass.) 207; *Allen v. Bryson*, 67 Iowa, 591; *Shepard v. Rhodes*, 7 R. I. 470; *Chamberlin v. Whitford*, 102 Mass. 450; *Bartholmew v. Jackson*, 20 Johns. 28; *Carson v. Clark*, 1 Scam. 113.

²⁶ *Davidson v. Gas Light Co.*, 99 N. Y. 566; *Milliken v. Telegraph Co.*, 110 N. Y. 403, 411.

²⁷ *Doty v. Wilson*, 14 Johns. 378, 382; *Gleason v. Dyke*, 22 Pick. 390, 393; *Hassinger v. Solms*, 5 S. & R. 4, 8; *Paynter v. Williams*, 1 Crompt. & Mees, 819.

him, he may subsequently, if he has capacity to contract, waive the rule by renewing the original promise.²⁸

CASES

SECTION II.—CONSIDERATION.

Consideration is necessary to the validity of every contract; it may not be adequate to the promise, but must be of some value.

DEVECMON *v.* SHAW & DEVRIES, EX'RS.

69 MARYLAND, 199.—1888.

BRYAN, J. John Semmes Devecmon brought suit against the executors of John S. Combs, deceased. He declared in the common counts and also filed a bill of particulars. After judgment by default, a jury was sworn to assess the damages sustained by the plaintiff. The evidence consisted of certain accounts taken from the books of the deceased, and testimony that the plaintiff was a nephew of the deceased, and lived for several years in his family, and was in his service as clerk for several years. The plaintiff then made an offer of testimony, which is thus stated in the bill of exceptions: "That the plaintiff took a trip to Europe in 1878, and that said trip was taken by said plaintiff, and the money spent on said trip was spent by the said plaintiff at the instance and request of said Combs, and upon a promise from him that he would reimburse and repay to the plaintiff all the money expended by him in said trip; and that the trip was so taken and the money so expended by the said plaintiff, but that the said trip had no connection with the business of said Combs; and that said Combs spoke to the witness of his conduct in being thus willing to pay his nephew's expenses as liberal and generous on his part." On objection, the court refused to permit the evidence to be given, and the plaintiff excepted.

It might very well be, and probably was the case, that the plaintiff would not have taken a trip to Europe at his own expense. But whether this be so or not, the testimony would have tended to show that the plaintiff incurred expense at the instance and re-

²⁸ *Earle v. Oliver*, 2 Exch. 90; *Read v. Batchelder*, 1 Met. 559; *Weston v. Hodgkins*, 136 Mass. 326; *Little v. Blunt*, 9 Pick. 488; *St. John v. Stephenson*, 90 Ill. 82; *Allen v. Ferguson*, 18 Wal. 1.

quest of the deceased, and upon an express promise by him that he would repay the money spent. It was a burden incurred at the request of the other party, and was certainly a sufficient consideration for a promise to pay. Great injury might be done by inducing persons to make expenditures beyond their means, on express promise of repayment, if the law were otherwise. It is an entirely different case from a promise to make another a present, or render him a gratuitous service. It is nothing to the purpose that the plaintiff was benefitted by the expenditure of his own money. He was induced by this promise to spend it in this way, instead of some other mode. If it is not fulfilled, the expenditure will have been procured by a false pretense.

As the plaintiff, on the theory of this evidence, had fulfilled his part of the contract, and nothing remained to be done but the payment of the money by the defendant, there could be a recovery in *indebitatus assumpsit*; and it was not necessary to declare on the special contract. The fifth count in the declaration is for "money paid by the plaintiff for the defendants' testator in his lifetime, at his request." In the bill of particulars we find this item: "To cash contributed by me, J. Semmes Devecmon, out of my own money, to defray my expenses to Europe and return, the said John S. Combs, now deceased, having promised me in 1878 'that if I would contribute part of my own money towards the trip, he would give me a part of his, and would make up to me my part,' and the amount below named is my contribution, as follows," etc. It seems to us that this statement is a sufficient description of a cause of action covered by the general terms of the fifth count. The evidence ought to have been admitted.

The defendants offered the following prayer, which the court granted:

"The defendants, by their attorneys, pray the court to instruct the jury that there is no sufficient evidence in this case to entitle the plaintiff to recover the interest claimed in the bill of particulars, marked 'Exhibit No. 1, Bill of Particulars.'"

The only evidence bearing on this question is the account taken from the books of the deceased which was offered in evidence by the plaintiff. This account showed on its face a final settlement of all matters embraced in it. In the absence of proof showing errors of some kind, the parties must be concluded by it in all respects. We think the prayer was properly granted.

Judgment reversed, and new trial ordered.

HAMER *v.* SIDWAY.

124 NEW YORK, 538.—1891.

Appeal from an order of the General Term of the Supreme Court which reversed a judgment in favor of plaintiff entered at the trial at Special Term.

The action was brought by plaintiff, as assignee, against defendant, as executor, upon a contract alleged to have been made between plaintiff's remote assignor and defendant's testator.

PARKER, J. The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator William E. Story became indebted to his nephew William E. Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that "on the 20th day of March, 1869 . . . William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of \$5,000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement."

The defendant contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration. A contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber, in 1875, defined consideration as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or

undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." Anson's Prin. of Con. 63.

"In general, a waiver of any legal right at the request of another party is a sufficient consideration for a promise." Parsons on Contracts, 444.

"Any damage, or suspension or forbearance of a right, will be sufficient to sustain a promise." Kent, Vol. 2, 465, 12th Ed.

Pollock, in his work on contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted, says: "The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him \$5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it, but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken.

In *Shadwell v. Shadwell* (9 C. B. N. S. 159) an uncle wrote to his nephew as follows:

"MY DEAR LANCEY—I am so glad to hear of your intended marriage with Ellen Nicholl, and as I promised to assist you at starting, I am happy to tell you that I will pay to you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery bar-

risters shall amount to 600 guineas, of which your own admission will be the only evidence that I shall require.

“Your affectionate uncle,

“CHARLES SHADWELL.”

It was held that the promise was binding and made upon good consideration.

In *Lakota v. Newton*, an unreported case in the Superior Court of Worcester, Mass., the complaint averred defendant's promise that “if you (meaning plaintiff) will leave off drinking for a year I will give you \$100,” plaintiff's assent thereto, performance of the condition by him, and demanded judgment therefor. Defendant demurred on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled.

In *Talbot v. Stemmons* (a Kentucky case not yet reported),²⁹ the step-grandmother of the plaintiff made with him the following agreement: “I do promise and bind myself to give my grandson, Albert R. Talbot, \$500 at my death, if he will never take another chew of tobacco or smoke another cigar during my life from this date up to my death, and if he breaks this pledge he is to refund double the amount to his mother.” The executor of Mrs. Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained and an appeal taken therefrom to the Court of Appeals, where the decision of the court below was reversed. In the opinion of the court it is said that “the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff and not forbidden by law. The abandonment of its use may have saved him money or contributed to his health; nevertheless, the surrender of that right caused the promise, and having the right to contract with reference to the subject matter, the abandonment of the use was a sufficient consideration to uphold the promise.” Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in *Lindell v. Rokes*, 60 Mo. 249.

The cases cited by the defendant on this question are not in point. In *Mallory v. Gillett* (21 N. Y. 412), *Belknap v. Bender* (75 Id. 446), and *Berry v. Brown* (107 Id. 659), the promise was in contravention of that provision of the statute of frauds which

declares void all promises to answer for the debts of third persons unless reduced to writing. In *Beaumont v. Reeve* (Shirley's L. C. 6) and *Porterfield v. Buller* (47 Miss. 165) the question was whether a moral obligation furnishes sufficient consideration to uphold a subsequent express promise. In *Duwall v. Wilson* (9 Barb. 487) and *In re Wilber v. Warren* (104 N. Y. 192) the proposition involved was whether an executory covenant against incumbrances in a deed given in consideration of natural love and affection could be enforced. In *Vanderbilt v. Schreyer* (91 N. Y. 392) the plaintiff contracted with defendant to build a house, agreeing to accept in part payment therefor a specific bond and mortgage. Afterwards he refused to finish his contract unless the defendant would guarantee its payment, which was done. It was held that the guarantee could not be enforced for want of consideration. For in building the house the plaintiff only did that which he had contracted to do. And in *Robinson v. Jewett* (116 N. Y. 40) the court simply held that "the performance of an act which the party is under legal obligation to perform cannot constitute a consideration for a new contract." It will be observed that the agreement which we have been considering was within the condemnation of the statute of frauds, because not to be performed within a year, and not in writing. But this defense the promisor could waive, and his letter and oral statements subsequent to the date of final performance on the part of the promisee must be held to amount to a waiver. Were it otherwise, the statute could not now be invoked in aid of the defendant. It does not appear on the face of the complaint that the agreement is one prohibited by the statute of frauds, and, therefore, such defense could not be made available unless set up in the answer. *Porter v. Wormser*, 94 N. Y. 431, 450. This was not done.

In further consideration of the questions presented, then, it must be deemed established for the purposes of this appeal, that on the 31st day of January, 1875, defendant's testator was indebted to William E. Story 2d, in the sum of \$5,000, and if this action were founded on that contract it would be barred by the statute of limitations which has been pleaded, but on that date the nephew wrote to his uncle as follows:

"DEAR UNCLE—I am now 21 years old today, and I am now my own boss, and I believe, according to agreement, that there is due me \$5,000. I have lived up to the contract to the letter in every sense of the word."

A few days later, on February 6th, the uncle replied, and so far as it is material to this controversy, the reply is as follows:

"DEAR NEPHEW—Your letter of the 31st ult. came to hand all right saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have \$5,000 as I promised you. I had the money in the bank the day you was 21 years old that I intended for you, and you shall have the money certain. Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. . . . This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. . . . "W. E. STORY.

"P. S.—You can consider this money on interest."

The trial court found as a fact that "said letter was received by said William E. Story 2d, who thereafter consented that said money should remain with the said William E. Story in accordance with the terms and conditions of said letter." And further, "That afterwards, on the first day of March, 1877, with the knowledge and consent of his said uncle, he duly sold, transferred, and assigned all his right, title, and interest in and to said sum of \$5,000 to his wife Libbie H. Story, who thereafter duly sold, transferred, and assigned the same to the plaintiff in this action."

We must now consider the effect of the letter, and the nephew's assent thereto. Were the relations of the parties thereafter that of debtor and creditor simply, or that of trustee and *cestui que trust*? If the former, then this action is not maintainable, because barred by lapse of time. If the latter, the result must be otherwise. No particular expressions are necessary to create a trust. Any language clearly showing the settler's intention is sufficient if the property and disposition of it are definitely stated. Lewin on Trusts, 55.

A person in the legal possession of money or property acknowledging a trust with the assent of the *cestui que trust*, becomes from that time a trustee if the acknowledgment be founded on a valuable consideration. His antecedent relation to the subject whatever it may have been, no longer controls. 2 Story's Eq. § 972. If before a declaration of trust a party be a mere debtor, a subsequent agreement recognizing the fund as already in his hands and stipulating for its investment on the creditor's account will have the effect to create a trust. *Day v. Roth*, 18 N. Y. 448.

It is essential that the letter interpreted in the light of surrounding circumstances must show an intention on the part of the uncle to become a trustee before he will be held to have become such; but in an effort to ascertain the construction which should be given to it, we are also to observe the rule that the language of the promisor is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. *White v. Hoyt*, 73 N. Y. 505, 511. At the time the uncle wrote the letter he was indebted to his nephew in the sum of \$5,000, and payment had been requested. The uncle, recognizing the indebtedness, wrote the nephew that he would keep the money until he deemed him capable of taking care of it. He did not say "I will pay you at some other time," or use language that would indicate that the relation of debtor and creditor would continue. On the contrary, his language indicated that he had set apart the money the nephew had "earned" for him, so that when he should be capable of taking care of it he should receive it with interest. He said: "I had the money in the bank the day you were 21 years old that I intended for you, and you shall have the money certain." That he had set apart the money is further evidenced by the next sentence: "Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it." Certainly, the uncle must have intended that his nephew should understand that the promise not "to interfere with this money" referred to the money in the bank which he declared was not only there when the nephew became 21 years old, but was intended for him. True, he did not use the word "trust," or state that the money was deposited in the name of William E. Story, 2d, or in his own name in trust for him, but the language used must have been intended to assure the nephew that his money had been set apart for him, to be kept without interference until he should be capable of taking care of it, for the uncle said in substance and in effect: "This money you have earned much easier than I did . . . you are quite welcome to. I had it in the bank the day you were 21 years old, and don't intend to interfere with it in any way until I think you are capable of taking care of it, and the sooner that time comes the better it will please me." In this declaration there is not lacking a single element necessary for the creation of a valid trust, and to that declaration the nephew assented.

The learned judge who wrote the opinion of the General Term,

seems to have taken the view that the trust was executed during the lifetime of defendant's testator by payment to the nephew, but as it does not appear from the order that the judgment was reversed on the facts, we must assume the facts to be as found by the trial court, and those facts support its judgment.

The order appealed from should be reversed and the judgment of the Special Term affirmed, with costs payable out of the estate. All concur.

Order reversed and judgment of Special Term affirmed.

Motive as distinguished from consideration.

FINK *v.* COX.

18 JOHNSON (N. Y.), 145.—1820.

Assumpsit to recover the amount of a promissory note given by defendant's testator to his son, the plaintiff. Verdict for plaintiff, subject to the opinion of the court as to the law of the case.

SPENCER, C. J., delivered the opinion of the court. The question in this case is, whether there is a sufficient consideration for the note on which this suit is founded. It appears from the declaration of the testator when the note was given, that he intended it as an absolute gift to his son, the plaintiff; alleging that the plaintiff was not so wealthy as his brothers, that he had met with losses, and that he and his brothers had had a controversy about a stall. Such were the reasons assigned for his giving the note to the plaintiff.

There can be no doubt that a consideration is necessary to uphold the promise, and that it is competent for the defendant to show that there was no consideration. 17 Johns. Rep. 301; *Schoonmaker v. Roosa and De Witt*. The only consideration pretended is that of natural love and affection from a father to a child; and if that is a sufficient consideration, the plaintiff is entitled to recover, otherwise not.

It is conceded that the gift, in this case, is not a *donatio causa mortis*, and cannot be supported on that ground. In *Pearson v. Pearson* (7 Johns. Rep. 26) the question was, whether the gift of

a note signed by the defendant to the plaintiff was such a vested gift, though without consideration, as to be valid in law; we held that it was not, and that a parol promise to pay money as a gift, was no more a ground of action than a promise to deliver a chattel as a gift; and we referred to the case of *Noble v. Smith* (2 Johns. Rep. 52), where the question underwent a full discussion and consideration. The case of *Grangiac v. Arden* (10 Johns. Rep. 293) was decided on the principle that the gift of the ticket had been completed by delivery of possession, and is in perfect accordance with the former cases.

It has been strongly insisted that the note in the present case, although intended as a gift, can be enforced on the consideration of blood. It is undoubtedly a fair presumption that the testator's inducement to give the note sprang from parental regard. The consideration of blood, or natural love and affection, is sufficient in a deed, against all persons but creditors and *bona fide* purchasers; and yet there is no case where a personal action has been founded on an executory contract, where a consideration was necessary, in which the consideration of blood, or natural love and affection, has been held sufficient. In such a case the consideration must be a valuable one, for the benefit of the promisor, or to the trouble, loss, or prejudice of the promisee. The note here manifested a mere intention to give the one thousand dollars. It was executory, and the promisor had a *locus pœnitentiæ*. It was an engagement to give, and not a gift. None of the cases cited by the plaintiff's counsel maintain the position, that because a parent, from love and natural affection, engages to give his son money, or a chattel, that such a promise can be enforced at law.

Judgment for the defendant.²⁰

Prima facie impossibility.

BEEBE v. JOHNSON.

19 WENDELL (N. Y.), 500.—1838.

This was an action of covenant.

On the 21st of January, 1833, Johnson, for the consideration of \$5,000, conveyed by deed to Beebe, the *sole* and *exclusive right* to

²⁰ Accord: *Whitaker v. Whitaker*, 52 N. Y. 368; *Schnell v. Nell*, 17 Ind. 29; *Smith v. Perine*, 121 N. Y. 376, 384.

make, use, and vend in Upper and Lower Canada, in certain counties of this State, and in other places, a threshing machine which had been patented to one Warren, and *covenanted to perfect the patent right in England as soon as practicable and within a reasonable space of time*, so as to secure to Beebe the entire control of the provinces of Upper and Lower Canada. In April, 1834, Beebe commenced this suit, and in his declaration, after setting forth the contract, averred, that although a reasonable time for the purpose had long since elapsed, that Johnson had not perfected the patent right in England, or otherwise secured to him the sole and exclusive right of making, using, and vending the machine in the provinces of Upper and Lower Canada. He further averred, that Johnson and himself being citizens of the United States, Johnson could not obtain, either for himself or for Beebe, the plaintiff, from the proper authorities in Canada, the exclusive right of vending the machine within those provinces; and so, he said, Johnson had not kept his covenant. The defendant pleaded the general issue, and gave notice of special matter to be proved on the trial. On the trial of the cause the plaintiff read in evidence a letter of the defendant, dated 8th of April, 1833, in which he admitted, in substance, that in the negotiation between the parties the exclusive right of vending the machine in the Canadas had been estimated at \$500. The plaintiff also proved by a witness, who had been employed in the Canadas by him in vending the article, that the exclusive right of vending it there would, in his opinion, be worth \$500. By a written stipulation between the parties, it was admitted that the patent right could not be perfected in England, because the authority to grant letters patent for such improvements was vested in the provinces, and that in the provinces the exclusive right of vending improvements of this nature can be conferred only upon a *subject of Great Britain*, and a *resident of the provinces*, and that the *patentee*, the *plaintiff*, and the *defendant* are all citizens of the United States, and cannot become subjects of Great Britain short of a residence in the provinces of seven years. The jury found a verdict for the plaintiff of \$601.23, being the sum of \$500, with the interest thereof from the date of the deed declared upon. The defendant's counsel having moved for a nonsuit, which was overruled, and having excepted to the charge of the judge, now moved for a new trial. The principal grounds relied upon in support of the application will appear from the opinion delivered refusing a new trial.

NELSON, C. J. It is supposed by the counsel for the defendant that a legal impossibility prevented the fulfilment of the covenant to perfect the patent right in England, so as to secure the monopoly of the Canadas to the plaintiff, and hence that the obligation was dispensed with, so that no action can be maintained. There are authorities which go that length, Co. Litt. 206, b.; Shep. Touch. 164; 2 Co. Litt. 26; Platt. on Cov. 569; but if the covenant be within the range of possibility, however absurd or improbable the idea of the execution of it may be, it will be upheld: as where one covenants it shall rain to-morrow, or that the Pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation, it must appear *that the thing to be done cannot by any means be accomplished*; for, if it is only improbable, or out of the power of the obligor, it is not in law deemed impossible. 3 Comyn's Dig. 93; 1 Roll. Abr. 419. Now it is clear that the fulfilment in this case cannot be considered an impossibility within the above exposition of the rule; because for anything we know to the contrary, the exclusive right to make, use, and vend the machine in the Canadas, might have been secured in England by act of Parliament or otherwise; at least, there is nothing in all this necessarily impossible. These provinces are a part of the British Empire, and subject to the power of the Parliament at home; which body might very well grant the privilege the defendant covenanted to procure. Certainly we are unable to say the government cannot or would not *by any means* grant it. There is, then, nothing in the case to take it out of the rule in *Paradine v. Jane* (Aleyn, 27) as expounded by Chambre, J., in *Beale v. Thompson* (3 Bos. & Pull. 420), namely, if a party enter into an absolute contract without any qualification or exception, and receives from the party with whom he contracts the consideration of such engagement, he must abide by the contract, and either do the act or pay damages; his liability arising from his own direct and positive undertaking. 6 T. R. 750; 8 Id. 267, Lawrence, J.; 10 East, 533; 4 Carr. & Payne, 295; 1 Selw. 344.

It has also been said that the action cannot be maintained, as the covenant contemplated the violation of the laws of England. We are unable to perceive the force of this objection, as the fulfilment of the covenant necessarily required the procurement of lawful authority to make and vend the machine in the Canadas. It is difficult to understand how this could be accomplished by

other than lawful means. That it might be by such, we have already considered not impossible.

Again, it was said the contract was void because it contemplated a renunciation of citizenship by the defendant. Whether if the fact was admitted, the consequence would follow, we need not stop to consider, because it is very clear that no such step is necessarily embraced in the covenant. For aught we know, the patent might be procured without such renunciation; and if it were considered unlawful to contract for expatriation, inasmuch as this agreement does not necessarily contemplate it, we would be bound without it. But even in England, the common law rule against the expatriation of the subject is so far modified that naturalization abroad for commercial purposes is recognized, and is of course lawful. 1 Comyn, 677; 8 T. R. 31; 1 Bos. & Pull. 430, 440, 444; 2 Kent's Comm. 49; 1 Peters C. C. R. 159. In the case of *Wilson v. Marryat* (8 T. R. 31, and 1 Bos. & Pull. 430) it was decided that Collet, a natural-born subject of Great Britain, having become a citizen of the United States, according to our laws, was entitled to all the advantages of an American citizen under the treaty of 1794. There the defendant undertook to avoid a policy of insurance procured by the plaintiff for the benefit of Collet upon an American ship and cargo, of which he was master, on the ground that he was a British subject, and therefore the trade in which he was engaged illegal, being in violation of the privileges of the East India Company, which trade was secured to American citizens by the treaty of 1794.

New trial denied.

Forbearance to sue.

PENNSYLVANIA COAL CO. v. BLAKE.

85 NEW YORK, 226.—1881.

Action to foreclose a mortgage. Judgment in favor of plaintiff. Appeal from decision of the General Term of the Supreme Court affirming judgment.

In March, 1873, plaintiff agreed with B. & Co. that if B. & Co. would give their notes secured by a mortgage on the separate estate of B.'s wife, the defendant, it would grant an extension of time on a debt then due from B. & Co. to plaintiff. The notes were

given in pursuance of the agreement, and about three weeks later defendant executed the mortgage in question. Defendant testified that she never received any consideration for executing the mortgage, that she never requested an extension of time for B. & Co. from plaintiff, nor did she know whether or not an extension had ever been given.

FOLGER, C. J. The first point made by the appellant is, that the mortgage given by her was without consideration, and is void.

It is so, that the appellant took no money consideration, nor any strictly personal benefit, for the giving of the mortgage by her. It was made for the benefit of others than her, entirely as a security for debts owing by them, and to procure for them further credit and favor in business. In other words, the lands of the appellant became the surety for the liabilities of the business firm of which her husband was a member. It is so, also, that the contract of surety needs a consideration to sustain it, as well as any other contract. *Bailey v. Freeman*, 4 Johns. 280; *Leonard v. Vredenburg*, 8 Id. 29. But that need not be something passing from the creditor to the surety. Benefit to the principal debtor, or harm or inconvenience to the creditor, is enough to form a consideration for the guaranty; and the consideration in that shape may be executory as well as executed at the time. *McNaught v. McClaughry*, 42 N. Y. 22; 8 Johns., *supra*. Now here was an agreement by the plaintiff to extend the payment of part of the debt owing by the principal debtor for a definite time, if the debtor would procure the mortgage of the appellant as a security for the ultimate payment of the amount of the debt thus extended. *Sage v. Wilcox*, 6 Conn. 81; *Breed v. Hillhouse*, 7 Id. 523. Though the actual execution of the mortgage by the appellant was on a day subsequent to that of the agreement between the creditor and the principal debtors, and subsequent to the dates of the extension notes, the mortgage and the notes were made in pursuance of that agreement, in consideration of it and to carry it out. The findings are full and exact on this point, and are sustained by the testimony. There is no proof that the actual delivery of the notes and mortgage was not contemporaneous; though the dates of the notes and the mortgage and the entry of credit in the books of the plaintiff do not correspond. All was done in pursuance of one agreement, and the plaintiff was not bound to forbearance until the mortgage was delivered. It was

not until then that the agreement to forbear was fixed and the consideration of benefit to the principals was had. It was not, therefore, a past consideration.

* * * * *

It follows that the judgment appealed from should be affirmed. All concur.

Judgment affirmed.

Compromise.

RUSSELL *v.* COOK.

3 HILL (N. Y.), 504.—1842.

Error to the Onondaga common pleas. Russell recovered judgment before a justice against Cook and Smith on a promissory note made by them, payable to Sanford B. Palmer or bearer, for \$68.34, with interest, and bearing date April 4, 1836. The note fell due in July, 1837, and was transferred to the plaintiff after that time. The defendants insisted that the note was without consideration.

COWEN, J. The defendants below admitted the execution of the note; and the burthen of showing that it was without consideration lay on them. They accordingly proved that several years before suit brought, they undertook with Palmer & Noble to transport from Manlius to Albany certain barley in which they (Palmer & Noble) had a special property, and which they were bound to see delivered at Albany to Taylor. The defendants were common carriers by their boat on the canal, which, owing to its accidentally striking a stone in the canal, of which the defendants could not be perfectly aware, was broken, sunk, and the water let in upon the barley, by which it was much injured. A dispute arose between the parties whether the defendants were liable, and this was compromised by Palmer & Noble, agreeing to discount one-half of their claim, and the defendants agreeing to pay the other. The half which fell upon the defendants was secured by several promissory notes, of which the note in question was one. The estimate of damages was deliberately and fairly made. Palmer & Noble were guilty of no fraud; the defendants were fully aware of all the facts; and there was no mistake in the case. This is the defense, as made out by the defendants'

own testimony. The court below submitted to the jury whether the notes were made without consideration, and the jury found for the defendants.

I am of opinion that the court below erred in omitting to charge the jury that the plaintiff was entitled to recover. No one would think of denying, that at least the dispute between the parties was doubtful, and that probably the law was against the defendants on the facts disclosed by their evidence. It is enough, however, that it was doubtful, and that the notes were given in pursuance of an agreement to compromise, in no way impeached for want of fairness. To show that this is so, I shall do little more than refer to *Chit. on Cont.*, 43, 44, ed. of 1842, and the notes, where cases are cited which refuse to open an agreement of this kind, under circumstances much stronger in favor of the defendant than exist here on the most liberal construction which the defense can pretend to claim. The case of *O'Keson v. Barclay* (2 Pennsylv. R. 531) sustained a promissory note given on the settlement of a slander suit for words not actionable. In such cases it matters not on which side the right ultimately turns out to be. The court will not look behind the compromise. *Taylor v. Patrick*, 1 Bibb, 168; *Fisher v. May's Heirs*, 2 Id. 448. It is not necessary, however, in the present case, to go farther than was done in *Longridge v. Dorville*, 5 Barn. & Ald. 117. There the ship *Carolina Matilda* had run foul of the ship *Zenobia* in the Thames, and the former was arrested and detained by process from the admiralty to secure the payment of the damage. The agents for the owners of the *Carolina Matilda* stipulated with the agents for the owner of the *Zenobia* that, on the latter relinquishing their claim on the *Carolina Matilda*, the damages should be paid on due proof of them, if they did not exceed £180. The proceedings in the admiralty being withdrawn, an action was brought on the promise. The *Carolina Matilda* had a regular Trinity-house pilot on board when the collision took place; and there was some doubt on the law, therefore, whether the owners were liable. Held, that the compromise being of a claim thus doubtful, the defendants were absolutely bound, without regard to the question of actual liability. Abbott, C. J., said, "The parties agree to put an end to all doubts on the law and the fact, on the defendants' engaging to pay a stipulated sum." "The parties agreed to waive all questions of law and fact." Indeed, such is the intent of every

compromise; and the best interests of society require that such should be the effect.

I therefore prefer putting the case on that ground, though I feel very little doubt that the defendants were liable to Palmer & Noble for the whole damages, instead of the half for which they were let off.

Judgment reversed.³¹

Doing or forbearing more than that to which one is legally bound.

TOLHURST *v.* POWERS.

133 NEW YORK, 460.—1892.

Appeal from judgment of the General Term of the Supreme Court, which affirmed a judgment in favor of defendant, entered upon the report of a referee.

This action was brought to recover a balance of an account originally due plaintiffs from one Clinton M. Ball for services in the construction and fitting of a dynamo and other electrical appliances, which it was claimed defendant had agreed to pay.

FINCH, J. We agree with the prevailing opinion of the General Term that there was no consideration to support the promise of Powers to pay Ball's debt to the plaintiffs. The latter originally constructed a dynamo for which Ball became indebted to them, and after all payments he remained so indebted when the machine was ready for delivery. The builders, of course, had a lien upon it for the unpaid balance, but waived and lost their lien

³¹ *Grandin v. Grandin*, 49 N. J. L. 508, 514 (1887): "The compromise of a disputed claim made *bona fide* is a good consideration for a promise, whether the claim be in suit, or litigation has not been actually commenced, even though it should ultimately appear that the claim was wholly unfounded—the detriment to the party consenting to a compromise, arising from the alteration in his position, forms the real consideration which gives validity to the promise. The only elements necessary to a valid agreement of compromise are the reality of the claim made and the *bona fides* of the compromise. *Cook v. Wright*, 1 B. & S. 559-570; *Callisher v. Bischoffsheim*, L. R. (5 Q. B.) 449; *Ockford v. Barelli*, 25 L. T. 504; *Miles v. N. Z. &c. Est. Co.*, 32 Ch. Div. 267, 283, 291, 298." See *Bellows v. Sowles*, 57 Vt. 164; *Schnell v. Nell*, 17 Ind. 29.

by a delivery to Ball without payment. He, being then the owner and holding the title free from any incumbrance, sold the dynamo to Crane on a contract apparently contingent upon the successful working of the machine. It did not work successfully and was sent back to plaintiffs to be altered, with a view of correcting its imperfections. At this point occurred the first intervention of the defendant Powers. He had not then obtained, so far as the case shows, any interest in the machine, and the complete title was either in Crane or Ball, or in both; but when the plaintiffs hesitated about entering upon the new work until their charges for it should be made secure, Powers agreed to pay them. The true character of that promise is immaterial, for, when the work was done, Powers did pay according to his contract. Thereafter, Ball and Powers requiring a delivery of the dynamo, the plaintiffs undertook or threatened to retain the possession till the original debt should be paid. That they had no right to do. Their primary lien was lost by the delivery, and they acquired no new one by reason of the repairs which were paid for. Such refusal to surrender the possession was an absolute wrong without any color of right about it. After demand their refusal was a trespass, and according to their own evidence the sole consideration for the promise which they claim that Powers made to pay the old debt of Ball was their surrender of possession. To that they were already bound, and parted with nothing by the surrender. They gave up no right which they had against any one, but extorted the promise by a threat of what would have been, if executed, a wrongful conversion. Doing what they were already bound to do furnished no consideration for the promise.

It is said, however, that Ball made no demand, and until he did the plaintiffs were not bound to deliver the possession, and that the delivery was to Powers and not to Ball. But there was certainly a request to ship the machine and so part with the possession, and both the request and the shipment were with the concurrence of Ball. It was that very request that brought up the subject of the old debt, and Ball stood by, plainly assenting, at least by omitting any dissent or objection. The shipment of Powers by name made it none the less a delivery to Ball, whose concurrence is explicitly found. Surely, after what happened, the latter could not have maintained an action for conversion on the ground that there had been no delivery to him. The undis-

puted fact is that the plaintiffs were seeking to withhold a delivery to the owner without the least right of refusal. There was no harm to plaintiffs and no benefit conferred on Powers. The former parted with nothing of their own, and the latter gained nothing, for the shipment to him was a delivery to Ball, the owner, since made with his concurrence, and Powers obtained no right or interest in the property as the result of the delivery. He simply took it, if he took at all, which is doubtful, as the agent or bailee of the owner, and acquired no right in it until a later period. Until the mortgage made subsequently, his advances for repairs constituted only an unsecured debt against Ball. The turning point of the appellant's argument is the unwarranted assumption that the plaintiffs agreed to deliver, and did deliver, the dynamo to one whom they knew not to be the owner without the assent of Ball, who was the owner, but who, nevertheless, stood by and made no objection. No fair construction of the evidence will sustain the appellant's theory.

The judgment should be affirmed, with costs. All concur.

Judgment affirmed.

A promise to perform a public duty.

SMITH *v.* WHILDIN.

10 PENNSYLVANIA STATE, 39.—1848.

In error from the Common Pleas of Philadelphia.

Assumpsit on the common counts. The plaintiff, who was a constable in Philadelphia, proved that the defendant had offered him a reward of \$100 for the arrest of one M. Crossin, against whom warrants had been issued on a charge for obtaining goods under false pretenses.

COULTER, J. There was no consideration for the promise, and the court below therefore misconceived the law. It is the duty of a constable to pursue, search for, and arrest offenders against whom criminal process is put into his hands. It is stated in Com. Digest (title Justice of the Peace, B. 79) that the duty of a constable requires him to do his utmost to discover, pursue, and arrest felons. The office of constable is created not for the

private emolument of the holder, but to conserve the public peace, and to execute the criminal law of the country. He is not the agent or employee of the private prosecutor, but the minister of the law, doing the work of the public, which he is bound to do faithfully for the fee prescribed by law, to be paid as the law directs. And it would be against public policy, as well as against law to hold otherwise.

There are things which a constable is not officially bound to do, such as to procure evidence, and the like, and for this he may perhaps be allowed to contract. And this is the full extent of the principle in the case cited from 11 Ad. and El. 856. But it has been held that even a sailor cannot recover for extra work on a promise by the master to pay for extra work in managing the ship in peril, the sailor being bound to do his utmost independently of any fresh contract. *Stilk v. Myrick* (2 Camp. 317), and the cases there cited.

It would open a door to profligacy, chicanery and corruption, if the officers appointed to carry out the criminal law were permitted to stipulate by private contract; it would open a door to the escape of offenders by culpable supineness and indifference on the part of those officers, and compel the injured persons to take upon themselves the burden of public prosecutions. It ought not to be permitted. Constables must do their utmost to discover, pursue, and arrest offenders within their township, district, or jurisdiction, without other fee or reward than that given by the law itself.

Judgment reversed, and a *venire de novo* awarded.³²

A promise to perform an existing contract.

COYNER v. LYNDE.

10 INDIANA, 282.—1858.

HANNA, J. The appellant was the plaintiff, and the appellees the defendants. The plaintiff was a contractor with the Richmond and Newcastle Railroad Company, for the construction of

³² In *McCandless v. Alleghany Bessemer Steel Co.* (152 Pa. St. 139 [1893]) a sheriff recovered money expended by him for expense of deputies selected by him at request of defendants, for their special benefit, and upon the faith of their promise to make good the amount thus advanced.

a portion of said road. The defendants undertook, and agreed with the plaintiff, to complete a portion of that contract, to wit, to grade the road, for which they were to receive from the company the same rates per yard, etc., that the plaintiff was to have received, and said defendants were to pay the plaintiff a certain portion of the sum so received, to wit, so much per yard, etc., as a premium, or for the privilege of said contract. This suit is for that sum, which was to have been thus paid by defendants to plaintiff.

The court overruled the demurrer to the sixth paragraph of the defendants' answer, and gave and refused certain instructions directed to the points involved in that paragraph. Of these rulings the plaintiff complains.

The sixth paragraph is, in substance, that after the plaintiff and defendants had entered into the agreement sued on, it was ascertained that the prices at which plaintiff had undertaken with the company to do the work were greatly inadequate; that it would be a losing business to prosecute the work; that upon such discovery, the defendants determined to abandon the contract, and leave the plaintiff to perform it; that the plaintiff, knowing he would suffer loss to complete the same himself at the prices, "in view of said facts, and to induce the defendants to go on with said work, and not throw the same on the hands of said plaintiff, he, said plaintiff, agreed that if said defendants would agree to continue to prosecute said work to final completion, and procure additional and extra pay from said company, which, with the amount agreed to be paid plaintiff, would enable them to complete said work, and save him from prosecuting the same, he, the said plaintiff, then and there agreed to release and acquit them from said payment," etc.; that relying on this promise, and an agreement of the company to pay them an additional compensation, they completed said work.

It is insisted by the plaintiff that there was not, nor is there alleged to be, any consideration for this new promise, and it was therefore void; whilst, by the defendants, it is argued that the contract was, in effect, abandoned, and the work afterwards resumed because of the new promise, and that such resumption of work was a sufficient consideration for the new agreement to pay a different sum, to wit, the whole, instead of a part, of the original contract price.

Whether the contract between the plaintiff and the defendants

was abandoned or not by the defendants, was a question to which the attention of the jury was fairly called by the instructions, and the law stated to them upon such a state of facts, if found. Under these circumstances, we cannot disturb their finding, especially as the whole evidence is not in the record. *Mills v. Riley*, 7 Ind. R. 138.

From the verdict of the jury, it is evident that they must have come to the conclusion that the contract had been abandoned. If it was abandoned, the plaintiff had his election, either to sue the defendants for non-performance, or to obtain the completion of the work by a new arrangement. If, in making such new arrangement or agreement, new or additional promises were made to the defendants dependent upon the completion of the work, and the defendants, in consideration of such promises, completed the work, we do not see anything to prevent such promises from being binding. *Munroe v. Perkins* (9 Pick. 302); 14 Johns. 330. Such new agreement might embrace in its terms, and definitely or by legitimate implication dispose of, any right of action which the plaintiff had, under the previous contract, against the defendants for failure to perform, or for portions of the sum due for work done, so far as it had progressed. 4 Ind. R. 75; 7 Id. 597. Whether a new agreement was made, and if so, whether the defendants were absolved thereby from the payment of the *bonus* previously agreed upon, were also questions of fact for the jury, and were, so far as we can see, properly submitted to them, and we cannot disturb their verdict thereon.

In the case cited in 14 Johns., the plaintiff undertook, by agreement under seal, to construct a certain cart-way for the sum of \$900. After progressing with the work, he ascertained that the price was inadequate, and determined to abandon the contract; whereupon the defendant agreed verbally to release him from the contract and pay him by the day if he would complete the work, which he did; and in a suit for work and labor, the second contract was considered binding. So the case in 9 Pickering was for work and labor, etc., in the erection of a hotel. Defense, a special contract, etc. Reply, waiver of the contract, and new promise, etc. And although, so far as can be gathered from the opinion, the evidence of an abandonment of the original contract was not by any means strong, yet the verdict of the jury is adverted to as settling that question. See also 7 Ind. R. 138.

As the evidence is not in the record, the presumption which we

have often decided would arise in reference to instructions given and refused, would prevent us from saying that the instructions given in this case were improper; and so, also, as to the ruling of the court in refusing those that were asked. 9 Ind. R. 115; Id. 230; Id. 286; 8 Id. 502; 7 Id. 531.

Per Curiam. The judgment is affirmed with costs.³³

ENDRISS *v.* BELLE ISLE ICE CO.

49 MICHIGAN, 279.—1882.

Assumpsit. Plaintiff brings error.

GRAVES, C. J. The ice company agreed with plaintiff, who is a brewer, to furnish him with the ice he would require for his brewery during the season of 1880 at \$1.75 per ton, or in case of scarcity, \$2 per ton. The parties proceeded under the contract until May, at which time the ice company refused further performance and so notified the plaintiff. Shortly afterwards the parties arranged that the ice company should furnish ice at \$5 per ton; but this was soon modified by reducing the price to \$4 per ton. This arrangement, it seems, was carried out. The plaintiff, however, brought this suit to recover damages for the breach of the original contract, and his contention was that when the ice company broke that contract the law made it his duty to use reasonable efforts to mitigate the damages, and hence to provide himself with ice on the best practicable terms, and without regard to the individuality of the party of whom it could or might be obtained, and that acting in accordance with that duty, he made a new contract with the ice company, and one wholly distinct from that which the company refused to perform, at \$4, and without waiving or impairing his right to hold the ice company for its violation of the original contract.

The ice company claimed, on the other hand, that the second arrangement was merely a modification by consent of the first,

³³ Accord: *Stewart v. Keteltas*, 36 N. Y. 388; *Thomas v. Barnes*, 156 Mass. 581; *Osborne v. O'Reilly*, 42 N. J. Eq. 467; *Moore v. Detroit Loc. Works*, 14 Mich. 266.

and that it left open no ground of action on account of the refusal of the company to perform the contract as it was originally made.

The trial judge was of opinion that the evidence was all one way, and that it afforded no room for argument in favor of the position of the plaintiff, and he ordered a verdict for the defendant. We are not able to concur in this view.

We think the circumstances raised a question for the jury, and that it should have been left to them to construe and weigh the evidence and at length decide between the conflicting theories. *Goebel v. Linn* (47 Mich. 489) has no application. The suit there was on a note, and the question was on the existence of legal consideration, and whether the defense of duress was compatible with admitted facts.

The judgment should be reversed with costs and a new trial granted.

The other Justices concurred.⁸⁴

LINGENFELDER *et al.* EXECUTORS *v.* WAINWRIGHT
BREWING CO.

103 MISSOURI, 578.—1890.

Appeal from St. Louis City Circuit Court.

Action by the executors of Jungenfeld for services performed by him. Jungenfeld, an architect, was employed by defendants to plan and superintend the construction of brewery buildings. He was also president of the Empire Refrigerating Company, and largely interested therein. The De La Vergne Ice Machine Company was a competitor in business. Against Jungenfeld's wishes, Wainwright awarded the contract for the refrigerating plant to the De La Vergne Company. The brewery was at that time in process of erection and most of the plans were made. When Jungenfeld heard that the contract was awarded, he took his plans, called off his superintendent on the ground, and notified Wainwright that he would have nothing more to do with the brewery. The defendants were in great haste to have their new brewery completed for divers reasons. It would be hard to find an architect in Jungen-

⁸⁴ *Rogers v. Rogers*, 139 Mass. 440; *Widiman v. Brown*, 83 Mich. 241.

feld's place, and the making of new plans and arrangements when another architect was found would involve much loss of time. *Under these circumstances* Wainwright promised to give Jungenfeld five per cent on the cost of the De La Vergne ice machine if he would resume work. Jungenfeld accepted, and fulfilled the duties of superintending architect till the completion of the brewery.

GANTT, P. J. Was there any consideration for the promise of Wainwright to pay Jungenfeld five per cent on the refrigerator plant? If there was not, plaintiff cannot recover the \$3,449.75, the amount of that commission. The report of the referee, and the evidence upon which it is based, alike show that Jungenfeld's claim to this extra compensation is based upon Wainwright's promise to pay him this sum to induce him, Jungenfeld, to complete his original contract under its original terms.

It is urged upon us by respondents that this was a new contract. New in what? Jungenfeld was bound by his contract to design and supervise this building. Under the new promise he was not to do anything more or anything different. What benefit was to accrue to Wainwright? He was to receive the same service from Jungenfeld under the new that Jungenfeld was bound to tender under the original contract. What loss, trouble, or inconvenience could result to Jungenfeld that he had not already assumed? No amount of metaphysical reasoning can change the plain fact that Jungenfeld took advantage of Wainwright's necessities, and extorted the promise of five per cent on the refrigerator plant, on the condition of his complying with his contract already entered into. Nor had he even the flimsy pretext that Wainwright had violated any of the conditions of the contract on his part.

Jungenfeld himself put it upon the simple proposition, that "if he, as an architect, put up the brewery, and another company put up the refrigerator machinery, it would be a detriment to the Empire Refrigerating Company," of which Jungenfeld was president. To permit plaintiff to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts, that they may profit by their own wrong.

"That a promise to pay a man for doing that which he is already under contract to do is without consideration," is conceded by respondents. The rule has been so long imbedded in the

common law and decisions of the highest courts of the various States that nothing but the most cogent reasons ought to shake it. *Harris v. Carter*, 3 E. & B. 559; *Stilk v. Myrick*, 2 Camp. 317; 1 Chitty on Contracts, 11 Amer. ed., 60; *Bartlett v. Wyman*, 14 Johns. 260; *Reynolds v. Nugent*, 25 Ind. 328; *Ayres v. Railroad*, 52 Iowa, 478; *Festerman v. Parker*, 10 Ired. 474; *Eblin v. Miller*, 78 Ky. 371; *Sherwin & Co. v. Brigham*, 39 Ohio St. 137; *Overdeer v. Wiley*, 30 Ala. 709; *Jones v. Miller*, 12 Mo. 408; *Kick v. Merry*, 23 Mo. 72; *Laidlou v. Hatch*, 75 Ill. 11; *Wimer v. Overseers of the Poor*, 104 Penn. St. 317; *Cobb v. Cowdery*, 40 Vermont 25; *Vanderbilt v. Schreyer*, 91 N. Y. 392.

But "it is carrying coals to New Castle" to add authorities on a proposition so universally accepted and so inherently just and right in itself. The learned counsel for respondents do not controvert the general proposition. Their contention is, and the Circuit Court agreed with them that, when Jungenfeld declined to go further on his contract, the defendant then had the right to sue for damages, and not having elected to sue Jungenfeld, but having acceded to his demand for the additional compensation, defendant cannot now be heard to say his promise is without consideration. While it is true Jungenfeld became liable in damages for the obvious breach of his contract, we do not think it follows that defendant is estopped from showing its promise was made without consideration.

It is true that as eminent a jurist as Judge Cooley, in *Goebel v. Linn* (47 Michigan, 489), held that an ice company which had agreed to furnish a brewery with all the ice they might need for their business from November 8, 1879, until January 1, 1881, at \$1.75 per ton, and afterwards in May, 1880, declined to deliver any more ice unless the brewery would give it \$3 per ton, could recover on a promissory note given for the increased price. Profound as is our respect for the distinguished judge who delivered that opinion, we are still of the opinion that his decision is not in accord with the almost universally accepted doctrine and is not convincing, and certainly so much of the opinion as holds that the payment by a debtor of a part of his debt then due would constitute a defense to a suit for the remainder is not the law of this State, nor do we think of any other where the common law prevails.

The case of *Bishop v. Busse* (69 Ill. 403) is readily distinguishable from the case at bar. The price of brick increased very considerably, and the owner changed the plan of the building so as

to require nearly double the number; owing to the increased price and change in the plans, the contractor notified the party for whom he was building, that he could not complete the house at the original prices, and, thereupon, a new arrangement was made, and it is expressly upheld by the court on the ground that the change in the buildings was such a modification as necessitated a new contract. Nothing we have said is intended as denying parties the right to modify their contracts, or make new contracts, upon new or different considerations and binding themselves thereby.

What we hold is that, when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and although by taking advantage of the necessities of his adversary he obtains a promise for more, the law will regard it as *nudum pactum*, and will not lend its process to aid in the wrong.

So holding, we reverse the judgment of the Circuit Court of St. Louis, to the extent that it allow the plaintiffs below, respondents here, the sum of \$3,449.75, the amount of commission at five per cent on the refrigerator plant; and, at the request of both sides, we proceed to enter the judgment here, which, in our opinion, the Circuit Court of St. Louis should have entered, and accordingly it is adjudged that the report of the referee be in all things approved, and that defendant have and recover of plaintiffs as executors of Edmund Jungenfeld the sum of \$1,492.17 so found by the referee with interest from March 9, 1887. All the judges of this division concur.³⁵

KING v. DULUTH, M. & N. RY. CO.

61 MINNESOTA, 482.—1895.

START, C. J. This is an action brought by the plaintiff, as surviving partner of the firm of Wolf & King, to recover a balance claimed to be due for the construction of a portion of the defendant's line of railway. The complaint alleges two supposed causes of action, to each of which the defendant demurred on the ground that neither states facts constituting a cause of

³⁵ *Goldsbrough v. Gable*, 140 Ill. 269.

action. From an order overruling the demurrer the defendant appealed.

1. The complaint for a first cause of action alleges, among other things, substantially, that in January, 1893, the firm of Wolf & King entered into three written contracts with the president and representative of the defendant for the grading, clearing, grubbing, and construction of the roadbed of its railway for a certain stipulated price for each of the general items of work and labor to be performed; that the firm entered upon the performance of such contracts, but in the latter part of February, 1893, in the course of such performance, unforeseen difficulties of construction, involving unexpected expenses, and such as were not anticipated by the parties to the contracts, were encountered. That the firm of Wolf & King found that by reason of such difficulties it would be impossible to complete the contracts within the time agreed upon without employing an additional and an unusual force of men and means, and at a loss of not less than \$40,000 to them, and consequently they notified the representative of the defendant that they would be unable to go forward with the contracts, and unable to complete or prosecute the work. Thereupon such representative entered into an agreement with them modifying the written contracts, whereby he agreed that if they would "go forward and prosecute the said work of construction, and complete said contract," he would pay or cause to be paid to them an additional consideration therefor, up to the full extent of the cost of the work, so that they should not be compelled to do the work at a loss to themselves; that in consideration of such promise they agreed to forward the work rapidly, and force the same to completion, in the manner provided in the specifications for such work, and referred to in such contracts. That in reliance upon the agreement modifying the former contracts, and in reliance upon such former contracts, they did prosecute and complete the work in accordance with the contracts as so modified by the oral agreement, to the satisfaction of all parties in interest. That such contracts and the oral contract modifying them were duly ratified by the defendant, and that the actual cost of such construction was not less than \$30,000 in excess of the stipulated amount provided for in the original written contracts.

It is claimed by appellant that the complaint shows no consideration for the alleged promise to pay extra compensation for

the work; that it is at best simply a promise to pay the contractors an additional compensation if they would do that which they were already legally bound to do. The general rule is that a promise of a party to a contract to do, or the doing of, that which he is already under a legal obligation to do by the terms of the contract is not a valid consideration to support the promise of the other party to pay an additional compensation for such performance. 1 Chit. Cont. 60; Pol. Cont. 176 (161); Leake, Cont. 621. In other words, a promise by one party to a subsisting contract to the opposite party to prevent a breach of the contract on his part is without consideration. The following cases sustain and illustrate the practical application of the rule. *Ayres v. Railroad Co.*, 52 Iowa, 478, 3 N. W. 522; *McCarty v. Association*, 61 Iowa, 287, 16 N. W. 114; *Lingenfelder v. Brewing Co.*, 103 Mo. 578, 15 S. W. 844; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Reynolds v. Nugent*, 25 Ind. 328; *Robinson v. Jewett*, 116 N. Y. 40, 22 N. E. 224; *Wimer v. Worth Tp.*, 104 Pa. St. 317.

If the allegations of the complaint, when taken together, are in legal effect simply that the contractors, finding by the test of experience in the prosecution of the work that they had agreed to do that which involved a greater expenditure of money than they calculated upon, that they had made a losing contract, and thereupon notified the opposite party that they were unable to proceed with the work, and he promised them extra compensation if they would perform their contract, the case is within the rule stated, and the demurrer ought to have been sustained as to the first cause of action.

It is claimed, however, by the respondent, that such is not the proper construction of the complaint, and that its allegations bring the case within the rule adopted in several states, and at least approved in our own, to the effect that if one party to a contract refuses to perform his part of it unless promised some further pay or benefit than the contract provides, and such promise is made by the other party, it is supported by a valid consideration, for the making of the new promise shows a rescission of the original contract and the substitution of another. In other words, that the party, by refusing to perform his contract, thereby subjects himself to an action for damages, and the opposite party has his election to bring an action for the recovery of such damages or to accede to the demands of his adversary and make the promise; and if he does so it is a relinquishment of the original contract and

the substitution of a new one. *Monroe v. Perkins*, 9 Pick. 305; *Bryant v. Lord*, 19 Minn. 396 (Gil. 342); *Moor v. Locomotive Works*, 14 Mich. 266; *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284; *Rogers v. Rogers*, 139 Mass. 440, 1 N. E. 122.

The doctrine of these cases as it is frequently applied does not commend itself either to our judgment or our sense of justice, for where the refusal to perform and the promise to pay extra compensation for performance of the contract are one transaction, and there are no exceptional circumstances making it equitable that an increased compensation should be demanded and paid, no amount of astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party. To hold, under such circumstances, that the party making the promise for extra compensation is presumed to have voluntarily elected to relinquish and abandon all of his rights under the original contract, and to substitute therefor the new or modified agreement, is to wholly disregard the natural inference to be drawn from the transaction, and invite parties to repudiate their contract obligations whenever they can gain thereby.

There can be no legal presumption that such a transaction is a voluntary rescission or modification of the original contract, for the natural inference to be drawn from it is otherwise in the absence of any equitable considerations justifying the demand for extra pay. In such a case the obvious inference is that the party so refusing to perform his contract is seeking to take advantage of the necessities of the other party to force from him a promise to pay a further sum for that which he is already legally entitled to receive. Surely it would be a travesty on justice to hold that the party so making the promise for extra pay was estopped from asserting that the promise was without consideration. A party cannot lay the foundation of an estoppel by his own wrong. If it be conceded that by the new promise the party obtains that which he could not compel, viz. a specific performance of the contract by the other party, still the fact remains that the one party has obtained thereby only that which he was legally entitled to receive, and the other party has done only that which he was legally bound to do. How, then, can it be said that the legal rights or obligations of the party are changed by the new promise? It is entirely

competent for the parties to a contract to modify or to waive their rights under it, and ingraft new terms upon it, and in such a case the promise of one party is the consideration for that of the other; but where the promise to the one is simply a repetition of a subsisting legal promise there can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract.

But where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration. In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted, and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule that a promise to do that which a party is already legally bound to do is not a sufficient consideration to support a promise by the other party to the contract to give the former an additional compensation or benefit. 1 Whart. Cont. § 500.

On the other hand, where no unforeseen additional burdens have been cast upon a party refusing to perform his contract, which make his refusal to perform, unless promised further pay, equitable, and such refusal and promise of extra pay are all one transaction, the promise of further compensation is without consideration, and the case falls within the general rule, and the promise cannot be legally enforced, although the other party has completed his contract in reliance upon it. This proposition, in our opinion, is correct on principle and supported by the weight of authority. What unforeseen difficulties and burdens will make a party's refusal to go forward with his contract equitable, so as to take the case out of the general rule and bring it within the exception, must depend upon the facts of each particular case. They must be substantial, unforeseen, and not within the contemplation of the parties when the contract was made. They need not be such as would legally justify the party in his refusal

to perform his contract, unless promised extra pay, or to justify a court of equity in relieving him from the contract; for they are sufficient if they are of such a character as to render the party's demand for extra pay manifestly fair, so as to rebut all inference that he is seeking to be relieved from an unsatisfactory contract, or to take advantage of the necessities of the opposite party to coerce from him a promise for further compensation. Inadequacy of the contract price which is the result of an error of judgment, and not of some excusable mistake of fact, is not sufficient.

The cases of *Meech v. City of Buffalo* (29 N. Y. 198), where the unforeseen difficulty in the execution of the contract was quicksand, in place of expected ordinary earth excavation, and *Michaud v. MacGregor* (61 Minn. 198), where the unforeseen obstacles were rocks below the surface of the lots to be excavated, which did not naturally belong there, but were placed there by a third party, and of the existence of which both parties to the contract were ignorant when the contract was made, are illustrations of what unforeseen difficulties will take a case out of the general rule.

Do the allegations of fact contained in plaintiff's first alleged cause of action bring his case within the exception? Clearly not; for eliminating all conclusions, and considering only the facts alleged, there is nothing to make the case exceptional, other than the general statement that the season was so extraordinary that in order to do the stipulated work it would require great and unusual expense, involving a large use of powder and extra time and labor for the purpose of blasting out the frozen earth and other material which was encountered. What the character of this material was we are not told, or what the other extraordinary conditions of the ground were. The court will take judicial knowledge of the fact that frozen ground on the Missabe Range, where the work was to be performed, in the month of February, is not unusual or extraordinary. It was a matter which must have been anticipated by the parties, and taken into consideration by them when this contract was made. The most that can be claimed from the allegations of the complaint is that the contractors had made a losing bargain, and refused to complete their contract, and the defendant, by its representative, promised them that if they would go forward and complete their contract, it would pay them an additional compensation, so that the total compensation should be equal to the actual cost of the work.

2. The second cause of action is supported by a different and a valid consideration. It fairly appears from the allegations of the complaint as to this cause of action that the defendant, by changing its line and by its defaults, had so far delayed the work of construction as to legally excuse the contractors from their obligation to complete the work within the time originally agreed upon, and that to execute the work within such time would involve an additional expense. Thereupon, in consideration of their waiving the defaults and the delays occasioned by the defendant, and promising to complete the work in time, so that it could secure the bonds, it promised to pay or give to them the extra compensation. This was a legal consideration for such promise, and the allegations of the second general subdivision of the complaint state a cause of action.

So much of the order appealed from as overruled the defendant's demurrer to the supposed first cause of action in the plaintiff's complaint must be reversed, and as to so much of it as overruled the demurrer to the second cause of action it must be affirmed, and the case remanded to the district court of the county of St. Louis with the direction to modify the order appealed from so as to sustain the demurrer as to the first cause of action, with or without leave to the plaintiff to amend, as such court may deem to be just.

So ordered.³⁶

MANETTI *v.* DOEGE.

48 N. Y. APPELLATE DIVISION, 567.—1900.

Appeal by the defendant, Paul Doege, from a judgment of the Municipal Court of the city of New York for the borough of The Bronx in favor of the plaintiff, entered in the office of the clerk of said court on the 3d day of November, 1899.

HIRSCHBERG, J. The defendant contracted with one Manger to build him a house. Manger sublet the contract to one Putts. Putts sub-contracted part of the work, including the cellar and foundation, to one Scully; and Scully employed the plaintiff to build the foundation for the sum of \$60. While the work was in

³⁶ See also *Sargent v. Robertson*, 17 Ind. App. 411, 46 N. E. 925.

progress defendant visited the job, whereupon plaintiff stopped work and entered into a conversation with the defendant. He told the defendant in substance that he was afraid he would not be paid by Scully and that he, therefore, intended to abandon the work. The defendant thereupon said to him, "Go ahead and finish the work, and I will pay you. Never mind about Scully." The plaintiff completed the work on the faith of this promise, and, in default of payment, has sued and recovered as on an original undertaking.

The general rule undoubtedly is that an agreement to do what one is under contract to do will not furnish a sufficient consideration to support a promise. In the cases cited by the appellant the existing engagement or contract was made with the promisor, and not, as in this instance, with a third person. The plaintiff here was under no engagement or contract with the defendant. The defendant could not compel the plaintiff to continue the work inasmuch as the latter had not contracted with him to do it. Nor would an agreement to do what one is under contract to do, be sufficient consideration to support a promise made by a third person unless some new consideration exists at the time of the promise as between the promisor and promisee. And that is the situation here. The defendant had an interest in the prompt prosecution of the work. The plaintiff, apprehensive of losing his pay, had concluded to throw up the job and take the chances of any claim by Scully for damages. The defendant, thereupon, in consideration of the benefit resulting to him from uninterrupted work upon the house, made a new and independent contract with the plaintiff, by the terms of which the latter consented to and did proceed with the work instead of abandoning it, and in consideration of which the defendant promised to pay the entire \$60. This was a valid and enforceable contract under the authorities. *King v. Despard*, 5 Wend. 277; *Lattimore v. Harsen*, 14 Johns. 330; *Alley v. Turck*, 8 App. Div. 50; *Stewart v. Keteltas*, 36 N. Y. 388; *Pond v. Starkweather*, 99 Id. 411; *Scotson v. Pegg*, 6 H. & N. 295; *Monroe v. Perkins*, 9 Pick. 298.

The contract was not within the statute of frauds. *Snell v. Rogers*, 70 Hun, 462; *White v. Rintoul*, 108 N. Y. 222; *Raabe v. Squier*, 148 Id. 81; *Clark v. Howard*, 150 Id. 232.

The judgment should be affirmed, with costs. All concurred.

Judgment affirmed, with costs.

A payment of a smaller sum in satisfaction of a larger.JAFFRAY *v.* DAVIS.

124 NEW YORK, 164.—1891.

POTTER, J. The facts found by the trial court in this case were agreed upon. They are simple and present a familiar question of law. The facts are that defendants were owing plaintiffs on the 8th day of December, 1886, for goods sold between that date and the May previous at an agreed price, the sum of \$7,714.37, and that on the 27th of the same December, the defendants delivered to the plaintiffs their three promissory notes, amounting in the aggregate to three thousand four hundred and sixty-two twenty-four one-hundredths dollars secured by a *chattel mortgage* on the stock, fixtures, and other property of defendants, located in East Saginaw, Michigan, which said notes and chattel mortgage were received by plaintiffs under an agreement to accept same in full satisfaction and discharge of said indebtedness. "That said notes have all been paid and said mortgage discharged of record."

The question of law arising from these facts and presented to this court for its determination is whether such agreement, with full performance, constitutes a bar to this action, which was brought after such performance to recover the balance of such indebtedness over the sum so secured and paid.

One of the elements embraced in the question presented upon this appeal is, viz., whether the payment of a sum less than the amount of a liquidated debt under an agreement to accept the same in satisfaction of such debt forms a bar to the recovery of the balance of the debt. This single question was presented to the English court in 1602, when it was resolved (if not decided) in *Pinnele's* case (5th Co. R. 117) "that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole," and that this is so, although it was agreed that such payment should satisfy the whole. This simple question has since arisen in the English courts and in the courts of this country in almost numberless instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness, or honesty. No respect-

able authority that I have been able to find has, after such unanimous disapproval by all the courts, held otherwise than as held in *Pinnel's* case, *supra*, and *Cumber v. Wane*, 1 Str. 426; *Foakes v. Beer*, L. R. 9 App. Cas. 605; 36 English Reports, 194; *Goddard v. O'Brien*, L. R. 9 Q. B. Div. 37; Vol. 21, Am. Law Register, 637, and notes.

The steadfast adhesion to this doctrine by the courts in spite of the current of condemnation by the individual judges of the court, and in the face of the demands and conveniences of a much greater business and more extensive mercantile dealings and operations, demonstrates the force of the doctrine of *stare decisis*. But the doctrine of *stare decisis* is further illustrated by the course of judicial decisions upon this subject; for while the courts still hold to the doctrine of the *Pinnel* and *Cumber v. Wane* cases, *supra*, they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or in other words, to extract if possible from the circumstances of each case a consideration for the new agreement, and to substitute the new agreement in place of the old, and thus to form a defense to the action brought upon the old agreement. It will serve the purpose of illustrating the adhesion of the court to settled law and at the same time enable us perhaps more satisfactorily to decide whether there was a good consideration to support the agreement in this case, to refer to the consideration, in a few of the numerous cases, which the courts have held to be sufficient to support the new agreement.

Lord Blackburn said in his opinion in *Foakes v. Beer*, *supra*, and while maintaining the doctrine, "that a lesser sum cannot be a satisfaction of a greater sum," "but the gift of a horse, hawk or robe, etc., in satisfaction is good," quite regardless of the amount of the debt. And it was further said by him in the same opinion, "that payment and acceptance of a parcel before the day of payment of a larger sum would be a good satisfaction in regard to the circumstance of time," "and so if I am bound in twenty pounds to pay you ten pounds at Westminster, and you request me to pay you five pounds at the day at York, and you will accept it in full satisfaction for the whole ten pounds, it is a good satisfaction." It was held in *Goddard v. O'Brien* (L. R. 9 Q. B. Div. 37; 21 Am. L. Reg. N. S. 637): "A, being indebted to B in 125 pounds 7s. and 9d. for goods sold and delivered, gave B a check (negotiable, I suppose) for 100 pounds payable on demand, which

B accepted in satisfaction, was a good satisfaction." Huddleston, B., in *Goddard v. O'Brien*, *supra*, approved the language of the opinion in *Sibree v. Tripp* (15 M. & W. 26), "that a negotiable security may operate, if so given and taken, in satisfaction of a debt of a greater amount; the circumstance of negotiability making it in fact a different thing and more advantageous than the original debt which was not negotiable."

It was held in *Bull v. Bull* (43 Conn. 455), "and although the claim is a money demand liquidated and not doubtful, and it cannot be satisfied with a smaller sum of money, yet if any other personal property is received in satisfaction, it will be good no matter what the value."

And it was held in *Cumber v. Wane*, *supra*, that a creditor can never bind himself by simple agreement to accept a smaller sum in lieu of an ascertained debt of a larger amount, such agreement being *nudum pactum*, but if there be any benefit or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement.

It was held in *Le Page v. McCrea* (1 Wend. 164) and in *Boyd v. Hitchcock* (20 Johns. 76) that "giving further security for part of a debt or other security, though for a less sum than the debt, and acceptance of it in full of all demands, make a valid accord and satisfaction."

That "if a debtor gives his creditor a note indorsed by a third party for a less sum than the debt (no matter how much less), but in full satisfaction of the debt, and it is received as such, the transaction constitutes a good accord and satisfaction." *Varney v. Conery*, 3 East R. 25. And so it has been held, "where by mode or time of part payment, different than that provided for in the contract, a new benefit is or may be conferred or a burden imposed a new consideration arises out of the transaction and gives validity to the agreement of the creditor" (*Rose v. Hall*, 26 Conn. 392), and so "payment of less than the whole debt, if made before it is due or at a different place from that stipulated, if received in full, is a good satisfaction." *Jones v. Bullitt*, 2 Lit. 49; *Ricketts v. Hall*, 2 Bush. 249; *Smith v. Brown*, 3 Hawks (N. C.) 580; *Jones v. Perkins*, 29 Miss. 139; *Schweider v. Lang*, 29 Minn. 254; 43 Am. R. 202.

In *Watson v. Elliott* (57 N. H. 511-513) it was held, "it is enough that something substantial, which one party is not bound

by law to do, is done by him or something which he has a right to do he abstains from doing at the request of the other party," [and this] is held a good satisfaction.

It has been held in a number of cases that if a note be surrendered (by the payee to the maker), the whole claim is discharged and no action can afterwards be maintained on such instrument for the unpaid balance. *Ellsworth v. Fogg*, 35 Vt. 355; *Kent v. Reynolds*, 8 Hun, 559.

It has been held that a partial payment made to another, though at the creditor's instance and request, is a good discharge of the whole debt. *Harper v. Graham*, 20 Ohio, 106. "The reason of the rule is that the debtor in such case has done something more than he was originally bound to do, or at least something different. It may be more or it may be less, as a matter of fact."

It was held by the Supreme Court of Pennsylvania in *Mechanics' Bank v. Huston* (Feb. 13, 1882, 11 W. Notes of Cases, 389), the decided advantage which a creditor acquires by the receipt of a negotiable note for a part of his debt, by the increased facilities of recovering upon it, the presumption of a consideration for it, the case of disposing of it in market, etc., was held to furnish ample reason why it should be a valid discharge of a larger account or open claim unnegotiable.

It has been held that a payment in advance of the time, if agreed to, is full satisfaction for a larger claim not yet due. *Brooks v. White*, 2 Met. 283; *Bowker v. Childs*, 3 Allen, 434.

In some States, notably Maine and Georgia, the legislature, in order to avoid the harshness of the rule under consideration, have by statute changed the law upon that subject by providing, "no action can be maintained upon a demand which has been cancelled by the receipt of any sum of money less than the amount legally due thereon, or for any good and valuable consideration however small." Citing *Weymouth v. Babcock*, 42 Maine, 42.

And so in *Gray v. Barton* (55 N. Y. 68), where a debt of \$830 upon book account was satisfied by the payment of \$1 by calling the balance a gift,—though the balance was not delivered except by fiction, and the receipt was in the usual form and was silent upon the subject of a gift; and this case was followed and referred to in *Ferry v. Stephens*, 66 N. Y. 321.

So it was held in *Mitchell v. Wheaton* (46 Conn. 315; 33 Am. R. 24) that the debtor's agreement to pay and the payment of

\$150 with the costs of the suit upon a liquidated debt of \$299 satisfied the principal debt.

These cases show in a striking manner the extreme ingenuity and assiduity which the courts have exercised to avoid the operation of the "rigid and rather unreasonable rule of the old law," as it is characterized in *Johnston v. Brannan* (5 Johns. 268-272), or as it is called in *Kellogg v. Richards* (14 Wend. 116), "technical and not very well supported by reason," or as may be more practically stated, a rule that "a bar of gold worth \$100 will discharge a debt of \$500, while 400 gold dollars in current coin will not." See note to *Goddard v. O'Brien*, *supra*, in Am. Law Register, New Series, Vol. 21, pp. 640, 641.

The state of the law upon this subject, under the modification of later decisions both in England and in this country, would seem to be as expressed in *Goddard v. O'Brien* (Queen's Bench Division, *supra*): "The doctrine in *Cumber v. Wane* is no doubt very much qualified by *Sibree v. Tripp*, and I cannot find it better stated than in 1st Smith's Leading Cases (7th ed.), 595: 'The general doctrine in *Cumber v. Wane*, and the reason of all the exceptions and distinctions which have been engraved on it, may perhaps be summed up as follows, viz.: That a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum pactum*. But if there be any benefit or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement.'" *Bull v. Bull*, 43 Conn. 455; *Fisher v. May*, 2 Bibb. 449; *Reed v. Bartlett*, 19 Pick. 273; *Union Bank v. Geary*, 5 Peters, 99-114; *Le Page v. McCrea*, 1 Wend. 164; *Boyd v. Hitchcock*, 20 Johns. 76; *Brooks v. White*, 2 Metc. 283; *Jones v. Perkins*, 29 Miss. 139-141; *Hall v. Smith*, 15 Iowa, 584; *Babcock v. Hawkins*, 23 Vt. 561.

In the case at bar the defendants gave their promissory notes upon time for one-half of the debt they owed plaintiffs, and also gave plaintiffs a chattel mortgage on the stock, fixtures, and other personal property of the defendants under an agreement with plaintiffs, to accept the same in full satisfaction and discharge of said indebtedness. Defendants paid the notes as they became due, and plaintiffs then discharged the mortgage. Under the cases above cited, and upon principle, this new agreement was supported by a sufficient consideration to make it a valid agree-

ment, and this agreement was by the parties substituted in place of the former. The consideration of the new agreement was that the plaintiffs, in place of an open book account for goods sold, got the defendants' promissory notes, probably negotiable in form, signed by defendants, thus saving the plaintiffs perhaps the trouble or expense of proving their account, and got security upon all the defendants' personal property for the payment of the sum specified in the notes, where before they had no security.

It was some trouble, at least, and perhaps some expense to the defendants to execute and deliver the security, and they deprived themselves of the legal ownership, or of any exemptions or the power of disposing of this property, and gave the plaintiffs such ownership as against the defendants, and the claims thereto of defendants' creditors, if there were any.

It seems to me, upon principle and the decisions of this State (save, perhaps, *Keeler v. Salisbury*, 33 N. Y. 653, and *Platts v. Walrath*, Lalor's Supp. 59, which I will notice further on), and of quite all of the other States, the transactions between the plaintiffs and the defendants constitute a bar to this action. All that is necessary to produce satisfaction of the former agreement is a sufficient consideration to support the substituted agreement. The doctrine is fully sustained in the opinion of Judge Andrews in *Allison v. Abendroth* (108 N. Y. 470), from which I quote: "But it is held that where there is an independent consideration, or the creditor receives any benefit or is put in a better position, or one from which there may be legal possibility of benefit to which he was not entitled except for the agreement, then the agreement is not *nudum pactum*, and the doctrine of the common law to which we have adverted has no application." Upon this distinction the cases rest which hold that the acceptance by the creditor in discharge of the debt of a different thing from that contracted to be paid, although of much less pecuniary value or amount, is a good satisfaction, as, for example, a negotiable instrument binding the debtor and a third person for a smaller sum. *Curlewis v. Clark*, 3 Exch. 375. Following the same principle, it is held that when the debtor enters into a new contract with the creditor to do something which he was not bound to do by the original contract, the new contract is a good accord and satisfaction if so agreed. The case of accepting the sole liability of one of two joint debtors or copartners in satisfaction of the joint or copartnership debt is an illustration. This is held to be a good satisfaction, because the

sole liability of one of two debtors "may be more beneficial than the joint liability of both, either in respect of the solvency of the parties, or the convenience of the remedy." *Thompson v. Percival*, 5 B. & Adol. 925. In perfect accord with this principle is the recent case in this court of *Luddington v. Bell* (77 N. Y. 138), in which it was held that the acceptance by a creditor of the individual note of one of the members of a copartnership after dissolution for a portion of the copartnership debt was a good consideration for the creditor's agreement to discharge the maker from further liability. *Pardee v. Wood*, 8 Hun, 584; *Douglass v. White*, 3 Barb. Chy. 621-624.

Notwithstanding these later and decisive authorities, the plaintiffs contend that [despite] the giving of the defendants' notes with the chattel mortgage security and the payment, such consideration was insufficient to support the new or substituted agreement, and cites as authority for such contention the cases of *Platts v. Walrath* (Lalor's Supp. 59) and *Keeler v. Salisbury* (33 N. Y. 648).

Platts v. Walrath arose in justice court, and the debt in controversy was put forth as a set-off. The remarks of the judge in the former case were quite obiter, for there were various subjects in dispute upon the trial, and from which the justice might have reached the conclusion that he did. The judge in the opinion relied upon says: "Looking at the loose and secondary character of the evidence as stated in the return, it was perhaps a question of fact whether any mortgage at all was given; or, at least, whether, if given, it was not in terms a mere collateral security for the large note," "even the mortgagee was left to parol proof. Did it refer to and profess to be a security for the note of \$1,500, or that sum less the fifty dollars agreed to be thrown off, etc., etc.?"

There is so much confusion and uncertainty in the case that it was not thought advisable to publish the case in the regular series of reports. The case of *Keeler v. Salisbury*, *supra*, is not to be regarded as an authority upon the question or as approving the case of *Platts v. Walrath*, *supra*. In the case of *Keeler v. Salisbury*, the debtor's wife had joined in the mortgage given by her husband, the debtor, to effect the compromise, thus releasing her inchoate right of dower. The court held that fact constituted a sufficient consideration to support the new agreement, though the court in the course of the opinion remarked that it had been held

that the debtor's mortgage would not be sufficient, and referred to *Platts v. Walrath*. But the court did not otherwise indicate any approval of that case, and there was no occasion to do so, for, as before stated, the court put its decision upon the fact that the wife had joined in the mortgage.

In view of the peculiar facts in these two cases and the numerous decisions of this and other courts hereinbefore referred to, I do not regard them as authorities against the defendants' contention that the plaintiffs' action for the balance of the original debt is barred by reason of the accord and satisfaction, and that the judgment should be reversed, with costs. All concur.

Judgment reversed.

Mutual subscriptions.

SHERWIN *v.* FLETCHER.

168 MASSACHUSETTS, 413.—1897.

Contract on the following agreement:

"We, the undersigned subscribers, do hereby agree to pay the sum set against our respective names, the same to be payable under and in accordance with the following conditions, namely:

"1. The money by us subscribed is to be used for the purpose of erecting a building in the town of Ayer, to be used for the manufacture of boots and shoes.

"2. The details regarding the plan under which the subscribers hereto shall organize themselves, and upon which said building shall be erected and rented, shall be hereafter fixed and determined by a majority in numbers and interest of the subscribers hereto, at a meeting to be duly called for that purpose.

"3. No subscription hereto shall be binding until the sum of twelve thousand (12,000) dollars shall have been raised.

SAMUEL W. FLETCHER. \$200."

It is alleged that the \$12,000 was fully subscribed; that at a meeting, duly called, a majority in number and interest of the subscribers organized the "Ayer Building Association," elected the plaintiffs trustees, and authorized the purchase of land and the erection of a building; that relying upon defendant's promise the trustees purchased the land and erected the building; that defendant refuses to pay, etc.

Defendant demurred on the ground that no promise was made

to these plaintiffs and that there was no consideration for the promise. Demurrer overruled. Defendant appeals.

ALLEN, J. The demurrer to the declaration was rightly overruled. The written agreement signed by the defendant was virtually a promise to pay to such person or persons as should be fixed at a meeting of the subscribers. This promise was at the outset an offer, but when steps were taken in pursuance of Article 2, and a plan was fixed and determined as therein provided, and the plaintiffs were chosen trustees, they became the promisees; and when they proceeded to erect a building in reliance upon the subscriptions of defendant and others, and before any withdrawal or retraction by him, that supplied a good consideration, and the promise became valid and binding in law. *Athol Music Hall Co. v. Carey*, 116 Mass. 471; *Davis v. Smith American Organ Co.*, 117 Mass. 456; *Cottage Street Church v. Kendall*, 121 Mass. 528; *Hudson Real Estate Co. v. Tower*, 156 Mass. 82; S. C. 161 Mass. 10.

Judgment affirmed.

The consideration may be executory or executed, but it must not be past.

DEARBORN v. BOWMAN.

3 METCALF (MASS.), 155.—1841.

Assumpsit on a note in these terms: "June 17, 1839. I promise to pay Dearborn & Bellows sixty dollars in ninety days, value received. Bowman." Defense, want of consideration.

SHAW, C. J. The defense to the action to recover the amount of this note is want of consideration. It is manifest from the note itself, that it is not a negotiable instrument, being payable neither to order nor to bearer; indeed, it appears by the case, that the defendant declined making it negotiable. But total want of consideration is a good defense even to an action on a negotiable note, when brought by the promisee against the maker. Then the question is, whether upon the facts shown, any consideration appears for this promise. The note was given in consequence of services before that time performed by the plaintiffs, in printing

and circulating extra papers and documents, previously to an election of state senators, at which the defendant was a candidate. Such services imposed no obligation, legal or moral, on the defendant; and it would be somewhat dangerous to hold that they created any honorary obligation on him to pay for them. Nor would it be aided in a legal view, by a previous custom, if proved, for candidates to contribute to the payment of similar expenses, whether successful or otherwise in the election.

Nor were these services performed at the request of the defendant. On the contrary, it appears by the evidence that they were performed by General Staples, chairman of the county committee, who alone was responsible for the payment, and between whom and the defendant there was no privity, nor even any communication, until long after the services had been performed. The rule of law seems to be now well settled—though it may have formerly been left in doubt—that the past performance of services constitutes no consideration even for an express promise, unless they were performed at the express or implied request of the defendant, or unless they were done in performance of some duty or obligation resting on the defendant. *Mills v. Wyman*, 3 Pick. 207; *Loomis v. Newhall*, 15 Pick. 159; *Dodge v. Adams*, 19 Pick. 429. As the services performed by the plaintiffs were not done at the request of the defendant, as they were not done in the fulfilment of any duty or obligation resting on him, there was no consideration to convert the express promise of the defendant into a legal obligation.

Another ground, however, was taken in behalf of the plaintiffs, which was, that the discharge by the plaintiffs, of their legal demand against Staples, was a good consideration for the defendant's promise to them. If such discharge was in fact given, and given at the defendant's request, or if the defendant had promised to pay if they would discharge Staples *pro tanto*, and they did discharge him, it would have been a good consideration for the defendant's promise. But there is no evidence to establish the fact.

The court are of opinion that there was no legal consideration for the defendant's promise, and that no action can be maintained upon it.

Plaintiffs nonsuit.

MILLS v. WYMAN.

3 PICKERING (MASS.), 207.—1826.

Action of assumpsit to recover compensation for the board and care of defendant's adult son who fell sick among strangers, and was provided for under these circumstances by the plaintiff, the defendant having afterwards written to the plaintiff promising to pay him for expenses incurred.

PARKER, C. J. General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in *foro conscientiæ* to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise, and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported and that there must have been some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the statute of limitations,

of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo*; and according to the principles of natural justice, the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises, therefore, have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which has been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the *interior* forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well-disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

Without doubt, there are great interests of society which justify withholding the coercive arm of the law from these duties of im-

perfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the statute of limitations or bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value: though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application, to cases where at some time or other a good or valuable consideration has existed.

A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessities, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation upon the father; and it seems to follow, that his promise founded upon such a debt has no legally binding force.

The cases of instruments under seal and certain mercantile contracts, in which considerations need not be proved, do not contradict the principles above suggested. The first import a consideration in themselves, and the second belong to a branch of the mercantile law, which has found it necessary to disregard the point

of consideration in respect to instruments negotiable in their nature and essential to the interests of commerce.

Instead of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 Bos. & Pull. 249. The opinions of the judges had been variant for a long course of years upon this subject, but there seems to be no case in which it was nakedly decided that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to this position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient ability thereto. We do not know from the report any of the facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be adjudicated by the court to which is given jurisdiction on this subject. The legal liability does not arise until these facts have all been ascertained by judgment, after hearing the party intended to be charged.

For the foregoing reasons we are all of opinion that the nonsuit directed by the Court of Common Pleas was right, and that judgment be entered thereon for costs for the defendant.³⁷

“This court has never, when called upon, hesitated to say that a moral obligation is a sufficient consideration to support a promise to pay.”—*Mutual &c. Ass’n v. Hurst*, 78 Md. —; 26 Atl. R. 956. See also *Gray v. Hamil*, 82 Ga. 375.

³⁷ “We do not believe a case can be found where a moral obligation alone has been held to be a sufficient consideration for a subsequent promise.”—*Allen v. Bryson*, 67 Ia. 591.

Voluntarily doing that which another was legally bound to do.

GLEASON *v.* DYKE.

22 PICKERING (Mass.), 390.—1839.

In 1833 defendant gave a note to the Massachusetts Hospital Life Insurance Co., and a mortgage was given by him to secure the payment of the note. November 11, 1837, the defendant's equity of redemption was sold on execution to plaintiff, who on the 24th paid to the Insurance Co. the amount due on the note. The mortgage and note, both cancelled, and with a release indorsed upon the mortgage, were delivered up to the plaintiff by the company. Some days after the execution of the release, the defendant examined the note and mortgage for the purpose of ascertaining the amount due to the plaintiff, and promised the plaintiff to pay the same.

WILDE, J. There was no express proof that the note to the Massachusetts Hospital Life Insurance Company was paid at the request of the defendant; but the plaintiff relied on the promise of the defendant to pay him, made subsequently to the discharge of the mortgage. This promise, we think, is equivalent to a previous request. It comes within the well-established principle, that the subsequent ratification of an act done by a voluntary agent of another, without authority from him, is equivalent to a previous authority. The law, it is true, will not allow a party to maintain an action for money paid to discharge the debt of another without his consent; for to allow this, would subject every debtor to the power of those who might be disposed to injure him, and who might harass him with suits, and burden him with costs, in the most unreasonable and oppressive manner. But if the debtor assents to the payment, the reason of the law fails; and whether the consent be given before or after the payment is, as it seems to us, immaterial. *Yelv. (Metcalf's ed.) 42, note.* We have no doubt, therefore, that the defendant's promise is valid; first, because his ratification of the payment is equivalent to a previous request to pay, and the objection, that the consideration was past, cannot be maintained; and secondly, because the case shows an equitable consideration, which is sufficient to sustain an express promise. Where a man is under a moral obligation to pay a debt, which cannot be enforced by a court of law or equity, yet

if he promises to pay he will be bound. As where a man promises to pay a just debt, the recovery of which is barred by the statute of limitations; or if a minor contracts a debt, but not for necessities, and after he comes of age, promises to pay it; or if a debtor promises the assignee of a chose in action to pay him. In all such cases, and many others, the party will be bound by his promise, although before the promise the other party had no remedy either in law or equity. *Hawkes v. Saunders*, Cowper, 290.

There is another ground on which this action might be maintained, if there had been no express promise. The payment of the mortgage debt by the plaintiff was not merely voluntary. He was bound to pay the debt in order to secure his equitable interest in the estate. He was placed in this situation by the neglect of the defendant to pay the debt due to his creditor, who levied his execution on the equity of redemption. Under these circumstances no previous request to pay the debt, or subsequent ratification by the defendant, was required. *Child v. Morley*, 8 T. R. 610.

It was contended by the defendant's counsel, at the trial, that the operation of the payment of the mortgage was sufficient, under the circumstances, to constitute the plaintiff the assignee thereof, and to convey to him all the right of the original mortgagee. This right, we think, is sustained by the Revised Stat. c. 73, §§ 34, 35. But it by no means follows that the plaintiff has not a double remedy, as the mortgagee had. If the payment operated as an equitable assignment of the mortgage, it would have the same operation as to the note. If the plaintiff had a right to hold the mortgaged estate until the defendant paid the debt, then most clearly the defendant's promise is binding and obligatory, although the plaintiff had another security.

Default entered.³⁸

SHEPARD v. RHODES.

7 RHODE ISLAND, 470.—1863.

Assumpsit. Demurrer to declaration.

BULLOCK, J. The count demurred to states, in substance, that the plaintiffs had discharged the defendants from a certain debt, then due and owing from them to the plaintiffs, in consideration

³⁸ Accord: *Doty v. Wilson*, 14 Johns, 378.

of dividends to be received from the proceeds of certain effects assigned by the defendants; and that, subsequent to such discharge, the defendants feeling themselves honorably bound to pay to the plaintiffs this debt, in consideration thereof and of one dollar to them paid, made the following *new* promise, to wit, to pay to the plaintiffs in one year after a final dividend, any difference that might exist between their full debt and interest and the amount of any dividend or dividends the plaintiffs might have previously received. The count further states, that more than one year has elapsed since the plaintiffs received notice that *no* dividend would be paid them from the assigned effects.

This statement of the cause of action shows, in effect, two separate and distinct considerations, as the foundation of the *new* promise; *first*, a *moral* consideration, that the defendants, notwithstanding their discharge, felt themselves in honor bound to pay the plaintiffs' debt; and, *second*, the *valuable* consideration of one dollar, paid to the defendants by the plaintiffs when the new promise was made.

Are these considerations, as stated, sufficient in law to sustain the promise? Passing by the earlier cases, referred to at length in a note to the report of *Wennall v. Adney* (3 Bos. & Pull. 249), and some of which hold to the opposite, it may now be deemed settled, that no action can be maintained upon a promise founded upon a mere moral consideration. *Mills v. Wyman*, 3 Pick. 207; *Eastwood v. Kenyon*, 11 Ad. & Ell. 438; *Beaumont v. Reeve*, 8 Ad. & Ell. (N. S.) 483; S. C. 55 Eng. C. L. 483. It has been said, that such a doctrine is not creditable to the common law; but the rule has its origin in the widely diversified character of moral duties, and the consequent difficulty of measuring them with exactness, and determining which are so high and obligatory in their nature as to demand, in their performance, the payment of money.

There is a class of cases which for the most part have been regarded as not falling within the rule, that a mere moral consideration will not support a promise. Of such is the case of a promise barred by the statute of limitations, where the party is under no legal liability to pay when the promise is made. And so, of the promise of an infant, made after he becomes of age, to pay a debt incurred during his minority, and which debt he is then at liberty to ratify or avoid. Upon the same principle, a promise to pay a debt originally usurious, where usury avoids the

contract, but freed from all usury at the time the new promise is made, is binding, because the original contract is not *void*, but voidable only at the election of the borrower. And so, the promise of a bankrupt, made after certificate of discharge *granted* may be enforced, although now, in England, by statute (6 Geo. IV. c. 16) the promise must be in *writing*. But it is settled, that such considerations as love, friendship, natural affection, even the close relation existing between parent and child, are not, of themselves, sufficient to support an express promise. Whether the promise of a *feme covert*, after coverture ended, to pay a debt contracted during coverture, falls within the limit of the exception, has been a subject of frequent discussion, and of decisions somewhat contrariant. In *Lee v. Muggeridge* (5 Taunt. 36) an action was upheld against her executors, upon the bond of a *feme covert*, followed by her promise to pay, *dum sola*. But this case can hardly be deemed authority since the decision in *Eastwood v. Kenyon*, *supra*; and in New York an action was maintained against a woman, upon a contract of retainer entered into by her before a divorce. *Wilson v. Burr*, 25 Wend. 386. A more leading case, in the same state, affirming the validity of such a promise, is that of *Goulding v. Davidson* (3 Am. L. Reg. N. S. 34; 26 N. Y. 604), recently decided in the Court of Appeals. The facts were, that a *feme covert* represented herself as unmarried and as trading on her own account, and so procured credit, and purchased goods, for which she gave her note. Her coverture was not known to the creditor. After the death of her husband, she promised to pay this debt, and an action was brought upon this promise. The decision proceeds, mainly, upon the ground, that being guilty of fraud in the original undertaking, *trover* or *replevin* might have been brought against her and her husband at any time after the supposed purchase was made, and since this cause of action existed against her during coverture, a promise by her, after coverture, rested upon this as a sufficient consideration.

The principle recognized in, and which, almost without exception, has controlled this class of cases, is this: that when the *precedent original* consideration was sufficient to sustain the promise, but the *right of action* was suspended or barred by some positive rule of statutory or common law, the debtor might, by a subsequent promise, waive the exemption which the law has interposed indirectly for his benefit, but, mainly, from reasons of sound policy.

The case here is one where the original right of action was extinguished, not by the act of the law, but by the act of the parties. It was a *voluntary* release of the debt by the creditor to the debtor. In *Willing v. Peters* (12 S. & R. 179) the question arose, how far a promise to pay a debt, thus discharged, might be enforced; and because of the analogy between waiving a discharge created by act of law and one created by act of the parties, the court upheld the action. Shaw, C. J., in *Valentine v. Foster* (1 Metc. 522), admits the closeness of the analogy, and suggests, if the rule be not narrow, that allows the waiver in the one case to bind the party, and rejects it in the other: but he adds, that the Pennsylvania authority is the only one he has been able to find in support of the doctrine; and in the case then before him, ruled, that when a creditor released a debtor to make him a witness, the subsequent promise of the debtor was not binding. Considering his own decision, and that the case of *Willing v. Peters* was subsequently overruled in the same court, in *Snevily v. Read* (9 Watts, 396), while in other courts it has been repeatedly adjudicated, that after the voluntary release of a debt, an express promise does not revive it, nor does it form a sufficient consideration to support the new promise, we may affirm that such, at present, is the settled law. *Warren v. Whitney*, 24 Maine, 561; *Stafford v. Bacon*, 1 Hill, 533.

But the plaintiffs aver an additional consideration for the defendants' promise, and this raises another question; because the former consideration not being illegal, but only insufficient, the latter may sustain the promise declared upon. This additional consideration is one dollar, for which, it is alleged, the defendants promised, etc., to pay a sum greater than \$1,000.

Ordinarily, courts do not go into the question of equality or inequality of considerations; but act upon the presumption that parties capable to contract are capable, as well, of regulating the terms of their contracts, granting relief only when the inequality is shown to have arisen from mistake, misrepresentation or fraud. A different rule would, in every case, impose upon the court the necessity of inquiring into, and of determining the value of the property received by the party giving the promise. Such a course is obviously impracticable. In all cases, therefore, where the *assumption* or undertaking is founded upon the sale or exchange of merchandise or property, or upon other than a money consideration, and the promise has been deliberately made, the law looks

no further than to see that the obligation rests upon a consideration, that is, one recognized as legal, and of some value. But the reason of the rule ceases, and hence the rule ceases, when applied to contracts to pay money and founded solely upon a money consideration. How far a forbearance to sue, or the giving of time, or the mere waiver of some right, may support a promise, we do not consider, since the question does not arise. Nor, for the like reason, do we consider how far the rule is qualified or limited by special statutes regulating interest; or in that class of contracts peculiar to the law merchant, as bottomry, respondentia, and the course of exchange. Aside from these and some other exceptions, at common law a contract for the exchange of unequal sums of money at the same time, or at different times, when the element of time is no equivalent, is not binding; and in such cases courts may and do inquire into the equality of the contract; for its subject matter, upon both sides, has not only a fixed value, but is itself the standard of all values; and so, for the difference of value, there is no consideration. In this principle, the earliest prohibitions—earlier even than the time of Alfred—and the later legislative enactments against usury, both in England and in this country, have their origin. The rule is deemed to be founded in good policy.

In the case before us, the only legal consideration the defendants received was one dollar, for which they engaged to pay a much larger sum. The case, therefore, falls within the principle adverted to. The consideration was not only unequal, but grossly so. It was a mere nominal consideration; if even received by the defendants, it was, no doubt, regarded as such by them, and intended as such by the promisees. It was, at best, purely technical and colorable, and obviously is wanting in that degree of equitable equality sufficient to support the promise declared upon.

The demurrer to the *first* count is therefore sustained.

ENGINEERING CASES: EXCERPTS FROM DECISIONS.

CONSIDERATION.

A woman's promise to pay her husband's debt which has been barred by limitations is without consideration. *Sullivan v. Sullivan* (Cal.), 33 Pac. Rep. 862.

If materials which have been sold prove to have been destroyed before the bargain was made, there is no contract of sale. *Walker v. Tucker*, 70 Ill. 527.

An agreement by an owner to pay the contractor an additional sum for the performance of a contract which the contractor is already under obligation to carry out is one without consideration. *Jones v. Risley* (Tex. Sup.), 32 S. W. Rep. 1027.

A building contractor agreed to put another coat of oil on the inside of a house. The promise was made after he had performed his contract, and was without additional consideration. It was held that the promise was a gratuity and that his failure to fulfill it did not prevent his recovery on the original contract. *Widiman v. Brown* (Mich.), 47 N. W. Rep. 231 (1890).

An owner agreed to pay an architect an additional commission of 5% to resume work on a brewery for which he was under contract to furnish plans and superintendence. The promise was held to be void for want of consideration. *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578 (1890).

A construction company did not complete its contract as agreed. An agreement was entered into with the owner to accept a lower price because of this. Held: that the owner's consent to accept the work in an unfinished condition was good consideration for the reduction. *Fitzgerald v. Fitzgerald & Mallory Const. Co.* (Neb.), 59 N. W. Rep. 838.

In a suit over an excavation contract the contractor furnished proof that the work was found more difficult than was at first supposed. He had examined the work before taking the contract. The court held that this was not sufficient consideration to support a promise on the part of the owner to pay an additional price. *Casterton v. McIntire*, 23 N. Y. Supp. 301.

A contract may be changed in its terms or abrogated if there is a new consideration. *Juillard v. Chaffee*, 92 N. Y. 529.

A promise by the owner to pay an extra price to the contractor who threatened to stop work and abandon the contract because of unforeseen difficulties has been held to be binding. *Osborne v. O'Reilly*, 42 N. J. Eq. 467 (1887); *Hart v. Launman*, 29 Barb. (N. Y.) 410.

A promise by an owner to pay a sum to a contractor if he will do a certain act becomes binding on the owner when the contractor does the act, even though he did not promise to do it. *Train v. Gold*, 5 Pick. (Mass.) 380.

SECTION III.

CONTRACTS UNDER SEAL.

"Contracts under seal are formed by a deed, sealed and delivered. They involve the element of agreement, inasmuch as the parties, by executing the deed, agree to the matter contained in it; but they derive their legal effect solely from the formality of the deed which is used to witness the agreement, and not from the mere fact of agreement, as in the case with simple contracts." Leake, Digest, p. 134.

"In contracts made by deed under seal, a consideration is not essential to give validity to the promise, as it is in the case of simple contracts. . . ." Idem, p. 146.

"It thus becomes possible, by means of a deed under seal, to make a voluntary promise, that is, one that is gratuitous, or without any consideration, in a manner which shall be binding on the promisor, although such a promise cannot be made binding in the form of a simple contract." Idem, p. 147.

"A promise contained in a deed is called a covenant, also a special contract, or contract by specialty. No precise form of words is necessary to constitute a covenant. Any words in a deed which show an agreement to do a thing, make a covenant." Idem, p. 143.

"A seal upon an executory instrument, hereafter executed, is only presumptive evidence of a sufficient consideration, which may be rebutted as if the instrument was not sealed." N. Y. Code of Civil Procedure, § 840.

"The obligor has the right to avoid the instrument, if he can, by showing that there was no sufficient consideration for the contract, but the onus is upon him to establish this." *Home Ins. Co. v. Watson*, 59 N. Y. 390 (at p. 395).

The contract under seal is the formal contract, sometimes called a deed and sometimes a specialty; all others are simple contracts. The formal contract derives its validity from its form, while the simple contract derives its validity from its consideration. A deed must be in writing or be printed. It is executed when it is "signed, sealed and delivered." That which identifies a party to a deed with its execution aside from his signature is the presence of his seal;¹ that which makes it operative is its delivery by him. The delivery may be made by the actual handing to the other party, by tendering to a third party as his representative, or by retaining possession and making the statement that the deed is to become operative.²

If a contract is under seal, its form implies a consideration.³ The want of consideration, however, may be pleaded and proved;⁴ except against the *bona fide* assignee of a negotiable contract assigned to him before it becomes due.

Contracts under seal have the following characteristics:

1. That of Estoppel. "Where a man has entered into a solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any matter he has so asserted."⁵

2. That of Merger. If two parties enter into a simple contract and subsequently make the same agreement by deed, the former is merged into the latter and becomes void.⁶

3. That of Limitation. The right of action on a simple con-

¹ "The requisite of a seal at common law was that it be impressed upon wax, wafer, or other tenacious substances. . . . Whatever may have been the practice in other States, the rule of the common law in that respect has been substantially adhered to in this State, except so far as modified by statute." *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122, 132.

For statutory modifications, see Stimson's Am. St. Law, §§ 1564-5.

² "Delivery may be effected by words without acts, or by acts without words, or by both acts and words." *Ruckman v. Ruckman*, 32 N. J. Eq. 259, 261.

³ *Townsend v. Derby*, 3 Met. 363; *Bilderback v. Burlingame*, 27 Ill. 338; *Stacker v. Hewitt*, 1 Seam. (Ill.) 207; *Mitchell v. Sheldon*, 2 Blackf. (Ind.) 185.

⁴ *Schoonmaker v. Roosa*, 17 Johns. 301; *Case v. Boughton*, 11 Wend. 106; *Gage v. Lewis*, 68 Ill. 613; *Kirkpatrick v. Taylor*, 43 Ill. 207.

⁵ *Metropolitan Life Ins. Co. v. Bender*, 124 N. Y. 47. Only the parties to a sealed instrument can sue or be sued upon it. *Briggs v. Partridge*, 64 N. Y. 357.

⁶ *Cursan v. Monteiro*, 2 John. (N. Y.) 308; *Clifton v. Jackson Iron Co.*, 74 Mich. 183.

tract is limited to six years; that on a contract under seal is barred if not exercised within twenty years.⁷

4. That of Gratuitous Promise. Formerly a gratuitous promise made under seal, without consideration, was binding. At the present time the courts will not grant specific performance of a gratuitous promise. "Equity always requires actual consideration."¹ Its absence may be taken as corroborative evidence of fraud or undue influence.²

SECTION IV.

STATUTE OF FRAUDS.

The Statute of Frauds is developed from the English statute (29 Car. II c. 3) and known as "An Act for the Prevention of Frauds and Perjuries." It requires written evidence of certain classes of contracts before they can be enforced. When a contract is the subject of litigation, the facts of the case must be presented and proven. It is very difficult to do this if reliance must be placed solely upon the memories of the parties concerned. The existence of a certain fact may be one thing while the proof of it may be quite another. Since the verdict of the jury in any particular case must be based upon the facts as presented, it becomes all important that they be brought out and proved correctly.

To prevent frauds and perjuries, the various states have passed laws requiring certain contracts to be in writing in order that they may be proved in the courts; moreover, limits of time have been placed upon the liability of parties that justice may be meted out before important evidence is lost. Some of the states require that contracts for the construction of engineering works be recorded with the registry clerk of the district.

If the law calls for a certain contract to be in writing and it is not so made, the party suing has no ground for his action, and the party being sued, no defense.³ The person suing for services may recover upon a *quantum meruit*. Any variation of the terms of a contract required to be in writing must also be in writing.⁴

⁷ The period varies in the United States from ten to twenty years. Wood on Limitations of Actions, § 31.

¹ *Lamprey v. Lamprey*, 29 Minn. 151; *Smith v. Wood*, 12 Wis. 425.

² *Hall v. Perkins*, 3 Wend. (N. Y.) 626.

³ *Salb v. Campbell*, (Wis.) 27 N. W. Rep. 45; *Cohen v. Stene*, (Wis.) 21 N. W. Rep. 514.

⁴ *Malone v. Philadelphia*, 147 Pa. St. 416.

The statute of 29 Car. II c. 3 has been re-enacted in some form in all the American States except Maryland, Louisiana and New Mexico. Stimson, *Am. St. Law*, § 4140.

29 Car. II c. 3.

§ 4. "No action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; 2, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; 3, or to charge any person upon any agreement made upon consideration of marriage; 4, or upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; 5, or upon any agreement that is not to be performed within the space of one year from the making thereof; 6, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."

New York Session Laws, 1897. Chap. 417. Art. II.

§ 2. "Every agreement, promise or undertaking is void unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking—

1. By its terms is not to be performed within one year from the making thereof;

2. Is a special promise to answer for the debt, default or miscarriage of another person;

3. Is made in consideration of marriage, except mutual promise to marry;

4. Is a conveyance or assignment of a trust in personal property;

5. Is a subsequent or new promise to pay a debt discharged in bankruptcy;

6. Is a contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, and the buyer does not accept and receive part of such goods, or the evidences, or some of them, of such things in action; nor at the time, pay any part of the purchase money."

The more important provisions of the Statutes of Frauds in

the various states are as follows, only the portions of the statutes which pertain to engineering matters being presented in detail:

"Every agreement, promise or undertaking is void unless it or some note or memorandum thereof, etc."

1. The contract may be entered into at one time and the memorandum made subsequently;⁵ however, the memorandum must be made before the commencement of the action.⁶

2. It must state the names of the parties, the subject matter, the quantity, price and any special terms pertaining to the contract.

3. It is not necessary that the memorandum should pass from one of the parties to the other; it may be in the form of a letter written by the party to be charged and given to a third person,⁷ or it may be simply an entry upon the books.⁸

4. The memorandum may consist of several separate papers. Those which are not signed should be referred to in the paper which is signed,⁹ or, if they are all physically attached at the time of signing, it may be taken as the intention of the signer to make them all one.¹⁰

5. The essence of the promise must be shown in the memorandum with reasonable certainty.¹¹

6. Parol evidence may be admitted to identify the papers,¹² or the subject-matter to which they refer.¹³

7. The subscription of the party to be charged is usually his

⁵ *Gale v. Nixon*, 6 Cow. (N. Y.) 445, 448; *Lerned v. Wannemacher*, 9 Allen (Mass.) 416.

⁶ *Bill v. Bament*, 9 M. and W. 36; *Bird v. Munroe*, 66 Me. 337.

⁷ *Peabody v. Speyers*, 56 N. Y. 230, 237; *Moss v. Atkinson*, 44 Cal. 3; *Spangler v. Danforth*, 65 Ill. 152.

⁸ *Argus Co. v. Albany*, 55 N. Y. 495; *Tufts v. Plymouth Co.*, 14 Allen (Mass.) 407; *Camden Iron Works v. Fox*, 34 Fed. Rep. 200.

⁹ *Doughty v. Manhattan Brass Co.*, 101 N. Y. 644; *Peck v. Vandermark*, 99 N. Y. 29, 34; *Whelan v. Sullivan*, 102 Mass. 204, 206; *McConnell v. Brillhart*, 17 Ill. 354, 360.

¹⁰ *Tallman v. Franklin*, 14 N. Y. 584, 588; *Bayne v. Wiggins*, 139 U. S. 210; *Orne v. Cook*, 31 Ill. 238.

¹¹ *Peck v. Vandemark*, 99 N. Y. 29, 34; *Frazer v. Howe*, 106 Ill. 563, 574; *Atwood v. Cobb*, 16 Pick. 227, 230.

¹² *Beckwith v. Talbot*, 95 U. S. 292; *Work v. Cowhick*, 81 Ill. 317, 318; *Thayer v. Luce*, 22 Ohio St. 62, 74.

¹³ *Tallman v. Franklin*, 14 N. Y. 584; *Mead v. Parker*, 115 Mass. 413; *Cossitt v. Hobbs*, 56 Ill. 231; *Barry v. Coombe*, 1 Pet. 640.

name written at the end of the paper. It may be his initials;¹⁴ or his mark;¹⁵ it may be printed;¹⁶ or stamped;¹⁷; and it may be at the beginning or the middle of the memorandum;¹⁸ provided it is evident that the signer intended to authenticate every essential part of it.¹⁹

"By its terms is not to be performed within one year from the making thereof."

1. This clause is applicable only to those undertakings which by their express terms are not to be performed within one year, not to promises which merely may not be fulfilled within the year.²⁰ An agreement which may be performed within the period, even though it is improbable that it will be, does not come within the statute.²¹ A verbal contract to construct a road or a building within a year and twenty days from the date thereof was held valid, as it might be completed within the year.²²

2. A lease for a year to commence at a future date is within the statute.²³

3. An oral agreement to make annual payment in a contract which by its terms is to continue sixteen years is within the statute, and cannot be enforced.²⁴

4. Any contract which by its terms may be completed within a year is not within the statute, such as the delivery of timber to continue until the contractor is notified to stop;²⁵ to supply materials as long as wanted;²⁶ the agreement of a son to support his parents during their lives;²⁷ or the contract of a railroad company to lay a switch for a sawmill owner and maintain it as long as he

¹⁴ *Sanborn v. Flagler*, 9 Allen, 478; *Palmer v. Stephens*, 1 Denio, 478.

¹⁵ *Baker v. Dening*, 8 Ad. & E. 94; *Brown v. Bank*, 6 Hill, 443.

¹⁶ *Weston v. Myers*, 33 Ill. 424; *Drury v. Young*, 58 Md. 546.

¹⁷ *Bennett v. Brumfitt*, L. R. 3 C. P. 30.

¹⁸ *Clason v. Bailey*, 14 Johns. (N. Y.), 484, 486; *Coddington v. Goddard*, 16 Gray. (Mass.) 436, 444; *Sanborn v. Flagler*, 9 Allen (Mass.) 474.

¹⁹ *Boardman v. Spooner*, 13 Allen, 353, 358; *Brayley v. Kelly*, 25 Minn. 160.

²⁰ *McPherson v. Cox*, 96 U. S. 404, 416; *Walker v. Johnson*, 96 U. S. 424.

²¹ *Kent v. Kent*, 62 N. Y. 560, 564; *Peters v. Westborough*, 19 Pick. (Mass.) 364.

²² *Jones v. Pouch*, 41 Ohio St. 146.

²³ *Comstock v. Ward*, 22 Ill. 248; *Wheeler v. Frankenthal*, 78 Ill. 124.

²⁴ *Jackson Iron Co. v. Negaunee C. Co.* (C. C. A.), 65 Fed. Rep. 298.

²⁵ *Walker v. Railroad Co.* (S. C.), 1 S. E. Rep. 366 (1887).

²⁶ *Walker v. Johnson*, 96 U. S. 424.

²⁷ *Carr v. McCarthy*, 38 N. W. Rep. (Mich.) 241 (1888).

shall need it.²⁸ But an agreement which states affirmatively that it is not to be performed within a year is within the statute.

5. An agreement for services between employer and employee for a period longer than one year comes under the statute. If the employer discharges the employee without cause and then pleads the statute in defense, the employee may recover the value of the services performed in an action upon an implied assumption.²⁹

"Is a special promise to answer for the debt, default or miscarriage of another person."

1. This promise is in its nature a guaranty or security. The promise and the principal obligation which are accepted by the promisee constitute the consideration passing to him, while the consideration coming from him supports the promise as well as the principal obligation. All other cases call for an independent consideration for the promise.³⁰

2. A "special promise" is one in fact as contrasted with a promise implied in law.³¹

3. This promise is not one of indemnity, in which the promisor agrees to protect another from the harmful results of a transaction in which the promisor has an interest. In order to constitute a guaranty the promisor must have no interest in the transaction save that of his promise to pay the loss due to the other's default.

4. The liability of the third party must be in existence before the guarantor's promise;³² and must continue in existence³³ in order to come within the statute.

"Is a contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, etc."

This clause applies to sales of personal property. Blackstone's definition of a sale is a transfer of property "from one man to

²⁸ *Warner v. Texas & P. Ry. Co.*, 17 Sup. Ct. Rep. 147.

²⁹ *Day v. R. R. Co.*, 51 N. Y. 590; *Williams v. Bemis*, 108 Mass. 91; *Wm. B. Steel Works v. Atkinson*, 68 Ill. 421.

³⁰ *Erie Co. Bank v. Coit*, 104 N. Y. 532, 537; *Nelson v. Boynton*, 3 Met. 399-401.

³¹ *Goodwin v. Gilbert*, 9 Mass. 510; *Sage v. Wilcox*, 6 Conn. 85.

³² *Cahill v. Biglow*, 18 Pick. 369, 371; *Boston v. Farr*, 148 Pa. St. 220; *Blank v. Dreher*, 25 Ill. 331.

³³ *Meriden Britannia Co. v. Zingsen*, 48 N. Y. 250; *Wood v. Corcoran*, 1 Allen, 406.

another in consideration of some price." 2 Bl. 446. "To constitute a valid sale, there must be (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; (4) a price in money, paid or promised." Benjamin on Sales, p. 1.

1. If the goods which are the subject-matter of the contract are not in existence at the time the contract is made, there are various views of the situation which may be taken: the transaction may be regarded as a contract of sale or a contract for work and labor.

The English rule looks to the time of performance of the contract and holds that there may be a sale.

The New York rule looks to the time of the formation of the contract. "An agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, is not a contract of sale. There must be a sale at the time the contract is made." *Cooke v. Millard*, 65 N. Y. 352.

The Massachusetts rule looks to the nature of the contract itself. "A contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute."³⁴ *Goddard v. Binney*, 115 Mass. 450.

2. Expressions of satisfaction or acts indicating an acceptance will constitute an acceptance. Actual possession or a statement assuming possession constitute receipt.³⁵

3. If the buyer designates the carrier to transport the goods, then delivery of the goods to such carrier constitutes a receipt of them within the statute.³⁶

4. The acceptance and receipt of the goods need not take place at the same time. Either may precede the other.³⁷

5. The payment or part of it must be made at the time of the sale or bargain. If the payment takes place at a later date, there

³⁴ *Brown & H. Co. v. Wunder* (Minn.), 67 N. W. Rep. 357.

³⁵ *Baldehy v. Parker*, 2 Barn. & Cres. 37.

³⁶ *Cross v. O'Donnell*, 44 N. Y. 661; *Allard v. Greasert*, 61 N. Y. 1.

³⁷ *McKnight v. Dunlop*, 5 N. Y. 537.

should be a re-statement of the bargain. The sale then dates from this later time.³⁸

6. The payment should be made in cash, or by check; a promissory note is a mere promise, becoming cash only when it matures;³⁹ and is insufficient to take the case outside of the statute.

"Or upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them."

1. The terms apply to real property, not personal chattels. Natural growths such as trees are considered as an interest in lands and come within the statute.⁴⁰ Annual crops are regarded as chattel interests.⁴¹

2. All estates which are created or transferred must be in writing; usually there are the additional requirements that they shall be sealed, witnessed, acknowledged and recorded.

3. A lease of land or an interest in it should be in writing. Permission to occupy another's land for a long period and to erect thereon structures such as bridges, buildings, railroads, etc., to cover with water, to mine ore, to use for storage, etc., is practically a grant of an interest in the land and should be in writing.

CASES.

SECTION IV.—STATUTE OF FRAUDS.

Simple contracts which are required to be in writing.

BIRD *v.* MUNROE.

66 MAINE, 337.—1877.

Assumpsit. Defense, the statute of frauds. After hearing the evidence, which sufficiently appears in the opinion, the court directed that the action be made law on report to stand for trial if maintainable upon evidence legally admissible, otherwise the plaintiffs to be nonsuit.

PETERS, J. On March 2, 1874, at Rockland, in this state, the defendant contracted verbally with the plaintiffs for the purchase of a quantity of ice, to be delivered (by immediate shipments) to

³⁸ *Hunter v. Wetsell*, 57 N. Y. 375 (1874).

³⁹ *Combs v. Bateman*, 10 Barber 573.

⁴⁰ *Green v. Armstrong*, 1 Denio 550; *Killmore v. Howlett*, 48 N. Y. 569.

⁴¹ *Whipple v. Foote*, 2 Johns. 418; *Ross v. Welch*, 11 Gray 235.

the defendant in New York. On March 10, 1874, or thereabouts, the defendant, by his want of readiness to receive a portion of the ice as he had agreed to, temporarily prevented the plaintiffs from performing the contract on their part according to the preparations made by them for the purpose. On March 24, 1874, the parties, then in New York, put their previous verbal contract into writing, antedating it as an original contract made at Rockland on March 2, 1874. On the same day (March 24), by consent of the defendant, the plaintiffs sold the same ice to another party, reserving their claim against the defendant for the damages sustained by them by the breach of the contract by the defendant on March 10 or about that time. This action was commenced on April 11, 1874, counting on the contract as made on March 2, and declaring for damages sustained by the breach of contract on March 10, or thereabouts, and prior to March 24, 1874. Several objections are set up against the plaintiffs' right to recover.

The first objection is, that in some respects the allegations in the writ and the written proof do not concur. But we pass this point, as any imperfection in the writ may, either with or without terms, be corrected by amendment hereafter.

Then it is claimed for the defendant that, as matter of fact, the parties intended to make a new and original contract as of March 24, by their writing made on that day and antedated March 2, and that it was not their purpose thereby to give expression and efficacy to any unwritten contract made by them before that time. But we think a jury would be well warranted in coming to a different conclusion. Undoubtedly there are circumstances tending to throw some doubt upon the idea that both parties understood that a contract was fully entered into on March 2, 1874, but that doubt is much more than overcome when all the written and oral evidence is considered together. We think the writing made on the 24th March, with the explanations as to its origin, is to be considered precisely as if the parties on that day had signed a paper dated of that date, certifying and admitting that they had on the 2d day of March made a verbal contract, and stating in exact written terms just what such verbal contract was. Parol evidence is proper to show the situation of the parties and the circumstances under which the contract was made. It explains but does not alter the terms of the contract. The defendant himself invokes it to show that, according to his view, the paper bears an erroneous date. Such evidence merely discloses in this case

such facts as are part of the *res gestae*. Benjamin on Sales, § 213: *Stoops v. Smith*, 100 Mass. 63, 66, and cases there cited.

Then the defendant next contends that, even if the writing signed by the parties was intended by them to operate retroactively as of the first-named date, as a matter of law, it cannot be permitted to have that effect and meet the requirements of the statute of frauds. The position of the defendant is, that all which took place between the parties before the 24th of March was of the nature of negotiation and proposition only; and that there was no valid contract, such as is called for by the statute of frauds, before that day; and that the action is not maintainable, because the breach of contract is alleged to have occurred before that time. The plaintiffs, on the other hand, contend that the real contract was made verbally on the 2d of March, and that the written instrument is sufficient proof to make the verbal contract a valid one as of that date (March 2), although the written proof was not made out until twenty-two days after that time. Was the valid contract, therefore, made on March 2d or March the 24th? The point raised is, whether, in view of the statute of frauds, the writing in this case shall be considered as constituting the contract itself, or at any rate any substantial portion of it, or whether it may be regarded as merely the necessary legal evidence by means of which the prior unwritten contract may be proved. In other words, is the writing the contract, or only evidence of it? We incline to the latter view.

The peculiar wording of the statute presents a strong argument for such a determination. The section reads: "No contract for the sale of any goods, wares, or merchandise, for \$30 or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or his agent." In the first place, the statute does not go to all contracts of sale, but only to those where the price is over a certain sum. Then the requirement of the statute is in the alternative. The contract need not be evidenced by writing at all, provided "the purchaser accepts and receives a part of the goods, or gives something in earnest to bind the bargain or in part payment thereof." If any one of these circumstances will as effectually perfect the sale as a writing would, it is not easily seen how the writing can actually constitute the contract, merely because a writing happens to exist. It could not

with any correctness be said, that anything given in earnest to bind a bargain was a substantial part of the bargain itself, or anything more than a particular mode of proof. Then it is not the contract that is required to be in writing, but only "some note or memorandum thereof." This language supposes that the verbal bargain may be first made, and a memorandum of it given afterwards. It also implies that no set and formal agreement is called for. Chancellor Kent says "the instrument is liberally construed without regard to forms." The briefest possible forms of a bargain have been deemed sufficient in many cases. Certain important elements of a completed contract may be omitted altogether. For instance, in this State, the consideration for the promise is not required to be expressed in writing. *Gillighan v. Boardman*, 29 Me. 79. Again, it is provided that the note or memorandum is sufficient, if signed only by the person sought to be charged. One party may be held thereby and the other not be. There may be a mutuality of contract but not of evidence or of remedy. Still, if the writing is to be regarded in all cases as constituting the contract, in many cases there would be but one contracting party.

Another idea gives weight to the argument for the position advocated by the plaintiffs; and that is, that such a construction of the statute upholds contracts according to the intention of parties thereto, while it, at the same time, fully subserves all the purposes for which the statute was created. It must be borne in mind that verbal bargains for the sale of personal property are good at common law. Nor are they made illegal by the statute. Parties can execute them if they mutually please to do so. The object of the statute is to prevent perjury and fraud. Of course, perjury and fraud cannot be wholly prevented; but, as said by Bigelow, J. (*Marsh v. Hyde*, 3 Gray, 331), "a memorandum in writing will be as effectual against perjury, although signed subsequently to the making of a verbal contract, as if it had been executed at the moment when the parties consummated their agreement by word of mouth." We think it would be more so. A person would be likely to commit himself in writing with more care and caution after time to take a second thought. The *locus penitentiæ* remains to him.

By no means are we to be understood as saying that all written instruments will satisfy the statute, by having the effect to make the contracts described in them valid from their first verbal inception. That must depend upon circumstances. In many, and per-

haps most, instances such a version of the transaction would not agree with the actual understanding of the parties. In many cases, undoubtedly, the written instrument is *per se* the contract of the parties. In many cases, as, for instance, like the antedating of the deed in *Egery v. Woodard* (56 Maine, 45), cited by the defendant, the contract (by deed) could not take effect before delivery; the law forbids it. So a will made by parol is absolutely void. But all these classes of cases differ from the case before us.

A distinction is attempted to be set up between the meaning to be given to R. S. c. 111, § 4, where it is provided that no unwritten contract for the sale of goods "shall be valid," and that to be given to the several preceding sections where it provided that upon certain other kinds of unwritten contracts "no action shall be maintained;" the position taken being that in the former case the contract is void, and in the other cases only voidable perhaps, or not enforceable by suit at law. But the distinction is without any essential difference, and is now so regarded, by authors generally and in most of the decided cases. All the sections referred to rest upon precisely the same policy. Exactly the same object is aimed at in all. The difference of phraseology in the different sections of the original English statute, of which ours is a substantial copy, may perhaps be accounted for by the fact, as is generally conceded, that the authorship of the statute was the work of different hands. Although our statute (R. S. 1871, § 4) uses the words "no contract shall be valid," our previous statutes used the phrase "shall be allowed to be good"; and the change was made when the statutes were revised in 1857, without any legislative intent to make any alteration in the sense of the section. R. S. 1841, c. 136, § 4. The two sets of phrases were undoubtedly deemed to be equivalent expressions. The words of the original English section are, "shall not be allowed to be good," meaning, it is said, not good for the purpose of sustaining an action thereon without written proof. Browne, St. Frauds, §§ 115, 136, and notes to the sections; Benjamin's Sales, § 114; *Townsend v. Hargraves*, 118 Mass. 325, and cases there cited.

There are few decisions that bear directly upon the precise point which this case presents to us. From the nature of things, a state of facts involving the question would seldom exist. But we regard the case of *Townsend v. Hargraves*, above cited, as representing the principle very pointedly. It was there held that the statute of frauds affects the remedy only and not the validity of

the contract; and that where there has been a completed oral contract of sale of goods, the acceptance and receipt of part of the goods by the purchaser takes the case out of the statute, although such acceptance and receipt are after the rest of the goods are destroyed by fire while in the hands of the seller or his agent. The date of the agreement rather than the date of the part acceptance was treated as the time when the contract was made; and the risk of the loss of the goods was cast upon the buyer. *Vincent v. Germond* (11 Johns. 283) is to the same effect. We are not aware of any case where the question has been directly adjudicated adversely to these cases. *Webster v. ZIELLY* (52 Barb. [N. Y.] 482), in the argument of the court, directly admits the same principle. The case of *Leather Cloth Co. v. Hieronimus* (L. R. 10 Q. B. 140) seems also to be an authority directly in point. *Thompson v. Alger* (12 Met. 428, 435) and *Marsh v. Hyde* (3 Gray, 331), relied on by defendant, do not, in their results, oppose the idea of the above cases, although there may be some expressions in them inconsistent therewith. Altogether another question was before the court in the latter cases.

But there are a great many cases where, in construing the statute of frauds, the force and effect of the decisions go to sustain the view we take of this question, by the very strongest implication; such as, that the statute does not apply where the contract has been executed on both sides, *Bucknam v. Nash*, 12 Maine, 474; that no person can take advantage of the statute but the parties to the contract, and their privies, *Cowan v. Adams*, 10 Maine, 374; that the memorandum may be made by a broker, *Hinckley v. Arey*, 27 Maine, 362; or by an auctioneer, *Cleaves v. Foss*, 4 Maine, 1; that a sale of personal property is valid when there has been a delivery and acceptance of part, although the part be accepted several hours after the sale, *Davis v. Moore*, 13 Maine, 424; or several days after, *Bush v. Holmes*, 53 Maine, 417; or ever so long after, *Browne*, St. Frauds, § 337, and cases there noted; that a creditor, receiving payments from his debtor without any direction as to their application, may apply them to a debt on which the statute of frauds does not allow an action to be maintained, *Haynes v. Nice*, 100 Mass. 327; that a contract made in France, and valid there without a writing, could not be enforced in England without one, upon the ground that the statute related to the mode of procedure and not to the validity of the contract, *Leroux v. Brown*, 12 C. B. 801; but this case has been questioned some-

what; that a witness may be guilty of perjury who falsely swears to a fact which may not be competent evidence by the statute of frauds, but which becomes material because not objected to by the party against whom it was offered and received, *Howard v. Sexton*, 4 Comstock, 157; that an agent who signs a memorandum need not have his authority at the time the contract is entered into, if his act is orally ratified afterwards, *Maclean v. Dunn*, 4 Bing. 722; that the identical agreement need not be signed, and that it is sufficient if it is acknowledged by any other instrument duly signed, *Gale v. Nixon*, 6 Cow. 445; that the recognition of the contract may be contained in a letter, or in several letters, if so connected by "written links" as to form sufficient evidence of the contract; that the letters may be addressed to a third person, *Browne*, St. Frauds, § 346; *Fyson v. Kitton*, 30 E. L. & Eq. 374; *Gibson v. Holland*, L. R. 1 C. P. 1; that an agent may write his own name instead of that of his principal if intending to bind his principal by it, *Williams v. Bacon*, 2 Gray, 387, 393, and citations there; that a proposal in writing, if accepted by the other party by parol, is a sufficient memorandum, *Reuss v. Picksley*, L. R. 1 Exc. 342; that where one party is bound by a note or memorandum the other party may be bound if he admits the writing by another writing by him subsequently signed, *Dobell v. Hutchinson*, 3 A. & E. 355; that the written contract may be rescinded by parol, although many decisions are opposed to this proposition, *Richardson v. Cooper*, 25 Maine, 450; that equity will interfere to prevent a party making the statute an instrument of fraud, *Ryan v. Dox*, 34 N. Y. 307; *Hassam v. Barrett*, 115 Mass. 256, 258; that a contract verbally made may be maintained for certain purposes, notwithstanding the statute; that a person who pays his money under it cannot recover it back if the other side is willing to perform; and he can recover if performance is refused, *Chapman v. Rich*, 63 Maine, 588, and cases cited; that a respondent in equity waives the statute as a defense unless set up in plea or answer, *Adams v. Patrick*, 30 Vt. 516; that it must be specially pleaded in an action at law, *Middlesex Co. v. Osgood*, 4 Gray, 447; *Lawrence v. Chase*, 54 Maine, 196; that the defendant may waive the protection of the statute and admit verbal evidence and become bound by it, *Browne*, St. Frauds. § 135.

It may be remarked, however, that in most courts a defendant may avail himself of a defense of the statute under the general issue. The different rule in Massachusetts and Maine grew out

of the practice act in the one state and in the statute requiring the filing of specifications in the other.

It is clear from the foregoing cases, as well as from many more that might be cited, that the statute does not forbid parol contracts, but only precludes the bringing of actions to enforce them. As said in *Thornton v. Kempster* (5 Taunt. 786, 788), "the statute of frauds throws a difficulty in the way of the evidence." In a case already cited, Jervis, C. J., said: "The effect of the section is not to avoid the contract, but to bar the remedy upon it, unless there be writing." See analogous case of *McClellan v. McClellan*, 65 Maine, 500.

But the defendant contends that this course of reasoning would make a memorandum sufficient if made after action brought, and that the authorities do not agree to that proposition. There has been some judicial inclination to favor the doctrine to that extent even, and there may be some logic in it. Still the current of decision requires that the writing must exist before action brought. And the reason for the requirement does not militate against the idea that a memorandum is only evidence of the contract. There is no actionable contract before memorandum obtained. The contract cannot be sued until it has been legally verified by writing; until then there is no cause of action, although there is a contract. The writing is a condition precedent to the right to sue. Wills, J., perhaps correctly describes it in *Gibson v. Holland*, *supra*, when he says, "the memorandum is in some way to stand in the place of a contract." He adds: "The courts have considered the intention of the legislature to be of a mixed character; to prevent persons from having actions brought against them so long as no written evidence was existing when the action was instituted." Browne, St. Frauds, § 338; Benjamin's Sales, § 159; *Fricker v. Thomlinson*, 1 Man. & Gr. 772; *Bradford v. Spyker*, 32 Ala. 134; *Bill v. Bament*, 9 M. & W. 36; *Philbrook v. Belknap*, 6 Vt. 383. In the last case it is said, "strictly speaking, the statute does not make the contract void, except for the purpose of sustaining an action upon it, to enforce it."

Action to stand for trial.

APPLETON, C. J., WALTON, DANFORTH, VIRGIN, and LIBBEY, JJ., concurred.⁴²

⁴² That the statute affects only executory contracts, see Finch, J., in *Brown v. Farmers Loan & Trust Co.*, 117 N. Y. 266, 273 (1889): "It is

CLASON *v.* BAILEY.

14 JOHNSON (N. Y.), 484.—1817.

These causes came before this court on writs of error to the Supreme Court. The facts in all were, substantially, the same. See *Merritt & Merritt v. Clason*, 12 Johns. Rep. 102.

THE CHANCELLOR. The case struck me upon the argument as being very plain. But as it may have appeared to other members of the court in a different, or, at least, in a more serious light, I will very briefly state the reasons why I am of opinion that the judgment of the Supreme Court ought to be affirmed.

The contract on which the controversy arises was made in the following manner:

Isaac Clason employed John Townsend to purchase a quantity of rye for him. He, in pursuance of this authority, purchased of Bailey & Voorhees 3,000 bushels, at one dollar per bushel, and at the time of closing the bargain, he wrote a memorandum in his memorandum book in the presence of Bailey & Voorhees, in these words: "February 29th, bought for Isaac Clason, of Bailey & Voorhees, 3,000 bushels of good merchantable rye, deliverable from the 5th to the 15th of April next, at one dollar per bushel, and payable on delivery."

The terms of the sale and purchase had been previously communicated to Clason, and approved of by him, and yet at the time of delivery he refused to accept and pay for the rye.

insisted, however, that the sale cannot stand because the contract was void under the statute of frauds. But that statute affects only executory and not executed contracts (*Dodge v. Crandall*, 30 N. Y. 304). It is the rule of evidence where the one party or the other is seeking performance or damages for non-performance. It has no office to perform when the contract has been executed on both sides, has been fully carried out by the parties, and requires no aid from the law."

As to whether the statute must be pleaded, the same judge in *Wells v. Monihan*, 129 N. Y. 161, 164 (1891), says: "So far as the defense in this case rests upon the statute of frauds, it must fail for two reasons. No such defense has been pleaded, and it is not raised by the averments of the complaint, and without one or the other of these conditions, the defense, if existing, cannot be made available. . . ." See also on this point, *Crane v. Powell*, 139 N. Y. 379 (1893); *Hamer v. Sidway*, 124 N. Y. 538.

See also *Hunt v. Jones*, 12 R. I. 265.

The objection to the contract, on the part of Clason, is that it was not a valid contract within the statute of frauds.

1. Because the contract was not signed by Bailey & Voorhees.
2. Because it was written with a lead pencil, instead of pen and ink.

I will examine each of these objections.

1. It is admitted that Clason signed this contract, by the insertion of his name by his authorized agent, in the body of the memorandum. The counsel for the plaintiff in error do not contend against the position that this was a sufficient subscription on *his* part. It is a point settled, that if the name of a party appears in the memorandum, and is applicable to the whole substance of the writing, and is put there by him or by his authority, it is immaterial in what part of the instrument the name appears, whether at the top, in the middle, or at the bottom. *Saunderson v. Jackson*, 2 B. & Puller, 238; *Welford v. Beazely*, 3 Atk. 503; *Stokes v. Moore*, cited by Mr. Coxe in a note to 1 P. Wms. 771. Forms are not regarded, and the statute is satisfied if the terms of the contract are in writing, and the names of the contracting parties appear. Clason's name was inserted in the contract by his authorized agent, and if it were admitted that the name of the other party was not there by their direction, yet the better opinion is, that Clason, the party who is sought to be charged, is estopped, by his name, from saying that the contract was not duly signed within the purview of the statute of frauds; and that it is sufficient, if the agreement be signed by the party to be charged.

It appears to me, that this is the result of the weight of authority both in the courts of law and equity.

In *Ballard v. Walker* (3 Johns. Cases, 60), decided in the Supreme Court, in 1802, it was held, that a contract to sell land, signed by the vendor only, and accepted by the other party, was binding on the vendor, who was the party there sought to be charged. So in *Roget v. Merrit* (2 Caines, 117) an agreement concerning goods signed by the seller, and accepted by the buyer, was considered a valid agreement, and binding on the party who signed it.

These were decisions here, under both branches of the statute, and the cases in the English courts are to the same effect.

In *Saunderson v. Jackson* (2 Bos. & Pull. 238) the suit was against the seller, for not delivering goods according to a memorandum signed by him only, and judgment was given for the

plaintiff, notwithstanding the objection that this was not a sufficient note within the statute. In *Champion v. Plummer* (4 Bos. & Pull. 252) the suit was against the seller, who alone had signed the agreement. No objection was made that it was not signed by both parties, but the memorandum was held defective, because the name of the buyer was not mentioned at all, and consequently there was no certainty in the writing. Again, in *Egerton v. Mathews* (6 East, 307) the suit was on a memorandum for the purchase of goods, signed only by the defendant, who was the buyer, and it was held a good agreement within the statute. Lastly, in *Allen v. Bennett* (3 Taunton, 169) the seller was sued for the non-delivery of goods, in pursuance of an agreement signed by him only, and judgment was rendered for the plaintiff. In that case Ch. J. Mansfield made the observation, that "the cases of *Egerton v. Mathews*, *Saunderson v. Jackson*, and *Champion v. Plummer*, suppose the signature of the seller to be sufficient; and every one knows it is the daily practice of the Court of Chancery to establish contracts signed by one person only, and yet a court of equity can no more dispense with the statute of frauds than a court of law can." So Lawrence, J., observed, that "the statute clearly supposes the probability of there being a signature by one person only."

If we pass from the decisions at the law to the courts of equity, we meet with the same uniform construction. Indeed, Lord Eldon has said (18 Vesey, 183) that chancery professes to follow courts of laws in the construction of the statute of frauds.

In *Hatton v. Gray* (2 Chan. Cas. 164; 1 Eq. Cas. Abr. 21, pl. 10) the purchaser of the land signed the agreement, and not the other party, and yet the agreement was held by Lord Keeper North to be binding on him, and this too on a bill for a specific performance. So in *Coleman v. Upcot* (5 Viner, 527, pl. 17) the Lord Keeper Wright held, that an agreement concerning lands was within the statute, if signed by the party to be charged, and that there was no need of its being signed by both parties, as the plaintiff, by his bill for a specific performance, had submitted to perform what was required on his part to be performed.

Lord Hardwicke repeatedly adopted the same language. In *Buckhouse v. Crosby* (2 Eq. Cas. Abr. 32, pl. 44) he said he had often known the objection taken, that a mutual contract in writing signed by both parties ought to appear, but that the objection had as often been overruled; and in *Welford v. Beazely* (3 Atk. 503)

he said there were cases where writing a letter, setting forth the terms of an agreement, was held a signing within the statute; and in *Owen v. Davies* (1 Ves. 82) an agreement to sell land, signed by the defendant only, was held binding.

The modern cases are equally explicit. In *Cotton v. Lee*, before the lords commissioners, in 1770, which is cited in 2 Bro. 564, it was deemed sufficient that the party to be charged had signed the agreement. So in *Seton v. Slade* (7 Vesey, 275) Lord Eldon, on a bill for a specific performance against the buyer of land, said that the agreement being signed by the defendant only, made him within the statute, a party to be charged. The case of *Fowle v. Freeman* (9 Vesey, 351) was an express decision of the master of the rolls, on the very point that an agreement to sell lands, signed by the vendor only, was binding.

There is nothing to disturb this strong and united current of authority but the observations of Lord Ch. Redesdale, in *Lawrenson v. Butler* (1 Sch. & Lef. 13), who thought that the contract ought to be mutual to be binding, and that if one party could not enforce it, the other ought not. To decree performance, when one party only was bound, would "make the statute really a statute of frauds, for it would enable any person who had procured another to sign an agreement, to make it depend on his own will and pleasure whether it should be an agreement or not." The intrinsic force of this argument, the boldness with which it was applied, and the commanding weight of the very respectable character who used it, caused the courts for a time to pause. Lord Eldon, in 11 Vesey, 592, out of respect to this opinion, waived, in that case, the discussion of the point; but the courts have, on further consideration, resumed their former track. In *Western v. Russell* (3 Vesey & Beames, 192) the master of the rolls declared he was hardly at liberty, notwithstanding the considerable doubt thrown upon the point by Lord Redesdale, to refuse a special performance of a contract to sell land, upon the ground that there was no agreement signed by the party seeking a performance; and in *Ormond v. Anderson* (2 Ball & Beatty, 370) the present lord chancellor of Ireland (and whose authority, if we may judge him from the ability of his decisions, is not far short of that of his predecessor) has not felt himself authorized to follow the opinion of Lord Redesdale. "I am well aware," he observes, "that a doubt has been entertained by a judge of this court, of very high authority, whether courts of equity would specifically execute an agree-

ment where one party only was bound; but there exists no provision in the statute of frauds to prevent the execution of such an agreement." He then cites with approbation what was said by Sir J. Mansfield in *Allen v. Bennet*.

I have thought, and have often intimated, that the weight of argument was in favor of the construction that the agreement concerning lands, to be enforced in equity, should be mutually binding, and that the one party ought not to be at liberty to enforce at his pleasure an agreement which the other was not entitled to claim. It appears to be settled (*Hawkins v. Holmes*, 1 P. Wms. 770) that though the plaintiff has signed the agreement, he never can enforce it against the party who has not signed it. The remedy, therefore, in such case is not mutual. But, notwithstanding this objection, it appears from the review of the cases that the point is too well settled to be now questioned.

There is a slight variation in the statute respecting agreements concerning the sale of lands, and agreements concerning the sale of chattels, inasmuch as the one section (being the 4th section of the English, and the 11th section of our statute) speaks of the party, and the other section (being the 17th of English, and the 15th of ours) speaks of the parties to be charged. But I do not find from the cases that this variation has produced any difference in the decisions. The construction, as to the point under consideration, has been uniformly the same in both cases.

Clason, who signed the agreement, and is the party sought to be charged, is, then, according to the authorities, bound by the agreement, and he cannot set up the statute in bar. But I do not deem it absolutely necessary to place the cause on this ground, though, as the question was raised and discussed, I thought it would be useful to advert to the most material cases, and to trace the doctrine through the course of authority. In my opinion, the objection itself is not well founded in point of fact.

The names of Bailey & Voorhees are as much in the memorandum as that of Clason. The words are, "Bought for Isaac Clason, of Bailey & Voorhees, 3,000 bushels," etc.; and how came their names to be inserted? Most undoubtedly they were inserted by their direction and consent, and so it appears by the special verdict. The jury find, that when the bargain was closed, Townsend, the agent of Clason, did at the time, and in their presence, write the memorandum; and if so, were not their names inserted by their consent? Was not Townsend their agent for that purpose?

If they had not assented to the memorandum, they should have spoken. But they did assent, for the memorandum was made to reduce the bargain to writing in their presence at the time it was closed. It was, therefore, as much their memorandum as if they had written it themselves. Townsend was, so far, the acknowledged agent of both parties. The auctioneer who takes down the name of a buyer, when he bids, is *quoad hoc*, his agent. *Emmerson v. Heelis*, 2 Taunt. 38. The contract was, then, in judgment of law reduced to writing, and signed by both parties; and it appears to me to be as unjust as it is illegal, for Clason or his representatives to get rid of so fair a bargain on so groundless a pretext.

2. The remaining objection is that the memorandum was made with a lead pencil.

The statute requires a writing. It does not undertake to define with what instrument, or with what material, the contract shall be written. It only requires it to be in writing, and signed, etc.; the verdict here finds that the memorandum was written, but it proceeds further, and tells us with what instrument it was written, viz., with a lead pencil. But what have we to do with the kind of instrument which the parties employed when we find all that the statute required, viz., a memorandum of the contract in writing, together with the names of the parties?

To write is to express our ideas by letters visible to the eye. The mode or manner of impressing those letters is no part of the substance or definition of writing. A pencil is an instrument with which we write without ink. The ancients understood alphabetic writing as well as we do, but it is certain that the use of paper, pen, and ink was, for a long time, unknown to them. In the days of Job they wrote upon lead with an iron pen. The ancients used to write upon hard substances, as stones, metals, ivory, wood, etc., with a style or iron instrument. The next improvement was writing upon waxed tables; until at last paper and parchment were adopted, when the use of the *calamus* or reed was introduced. The common law has gone so far to regulate writings, as to make it necessary that a deed should be written on paper or parchment, and not on wood or stone. This was for the sake of durability and safety; and this is all the regulation that the law has prescribed. The instrument or the material by which letters were to be impressed on paper or parchment has never yet been defined. This has been left to be governed by public convenience and usage; and as far as questions have arisen on this

subject, the courts have, with great latitude and liberality, left the parties to their own discretion. It has accordingly been admitted (2 Bl. Com. 297; 2 Bos. & Pull. 238; 3 Esp. Rep. 180) that printing was writing within the statute, and (2 Bro. 585) that stamping was equivalent to signing, and (8 Vesey, 175) that making a mark was subscribing within the act. I do not find any case in the courts of common law in which the very point now before us has been decided, viz., whether writing with a lead pencil was sufficient; but there are several cases in which such writings were produced, and no objection taken. The courts have impliedly admitted that writing with such an instrument, without the use of any liquid, was valid. Thus in a case in Comyn's Reports (p. 451) the counsel cited the case of *Loveday v. Claridge*, in 1730, where Loveday, intending to make his will, pulled a paper out of his pocket, wrote some things down with ink, and some with pencil, and it was held a good will. But we have a more full and authentic authority in a late case decided at doctors' commons (*Rymes v. Clarkson*, 1 Phillim. Rep. 22), where the very question arose on the validity of a codicil written with a pencil. It was a point over which the prerogative court had complete jurisdiction, and one objection taken to the codicil was the material with which it was written; but it was contended, on the other side, that a man might write his will with any material he pleased, *quocunque modo velit, quocunque modo possit*, and it was ruled by Sir John Nicholl, that a will or codicil written in pencil was valid in law.

The statute of frauds, in respect to such contracts as the one before us, did not require any formal and solemn instrument. It only required a note or memorandum, which imports an informal writing done on the spot, in the moment and hurry and tumult of commercial business. A lead pencil is generally the most accessible and convenient instrument of writing on such occasions, and I see no good reason why we should wish to put an interdict on all memoranda written with a pencil. I am persuaded it would be attended with much inconvenience, and afford more opportunities and temptation to parties to break faith with each other, than by allowing the writing with a pencil to stand. It is no doubt very much in use. The courts have frequently seen such papers before them, and have always assumed them to be valid. This is a sanction not to be disregarded.

I am, accordingly, of opinion that the judgment of the Supreme Court ought to be affirmed.

This was the opinion of the court. (Elmendorf & Livingston, senators, dissenting.)

It was thereupon ordered, adjudged, and decreed, that the judgment of the Supreme Court be, in all things, affirmed, and that the defendant recover from the plaintiffs their double costs, to be taxed, and that the record be remitted, etc.

Judgment affirmed.⁴⁸

Agreements which are not to be performed within the space of one year from the making thereof.

PETERS *v.* WESTBOROUGH.

19 PICKERING (MASS.), 364.—1837.

Assumpsit for expenses incurred, etc., in the support of Catharine Ladds, from March 2, 1835, until her death.

At the trial in the Common Pleas, before STRONG, J., it appeared that the plaintiff was an inhabitant of Westborough; that Catharine Ladds was the daughter of John Ladds, who resided in a neighboring town; that she came into the family of the plaintiff in March, 1834, when she was eleven or twelve years of age, and remained there until her death, which took place on the 31st of May, 1835, after a sickness of four or five months; that on the 2d of March, 1835, the plaintiff gave notice of her illness to one of the overseers of the poor of Westborough, and requested that she might be supported by the town; but that no action was taken by them on the subject.

The counsel of the defendants then proposed to show by parol evidence, that a short time before Catharine went into the plaintiff's family, it was agreed between him and her father that the plaintiff should take her into his family and employment for one month on trial, and if, at the end of the month, he was not satisfied with her, he might return her to her father, but that, otherwise, he should support her until she was eighteen years of age, and should not return her for any cause but bad conduct on her part; that, in pursuance of this agreement, she went into the family of the plaintiff, and that at the end of the month the

⁴⁸ Contra: *Wilkinson v. Heavenrich*, 58 Mich. 574.

plaintiff expressed himself to be satisfied with her, and never offered to return her to her father.

The plaintiff objected to the introduction of this evidence, on the ground that the contract, not being in writing, was void by the statute of frauds.

The judge ruled, that, as this contract was by parol, it was competent for the plaintiff to put an end to it at any time, and that, after the notice given to the overseers on the 2d of March, 1835, the plaintiff ceased to be liable for the support of the pauper; and the evidence was accordingly rejected.

The jury returned a verdict for the plaintiff. The defendant excepted to the ruling of the judge.

WILDE, J. This case depends on the question, whether the plaintiff was not, by his contract, as it was offered to be proved by the defendants, bound to support the pauper for the expenses of whose support the defendants are charged; and we are of opinion that he was so bound by his contract with the pauper's father. This was clearly a valid contract, unless, being by parol, it was void by the statute of frauds, as an agreement not to be performed within the space of one year from the making thereof. St. 1788, c. 16, § 1. But this clause of the statute extends only to such agreements as, by the express appointment of the parties, are not to be performed within a year. If an agreement be capable of being performed within a year from the making thereof, it is not within the statute, although it be not actually performed till after that period. 1 Com. on Contr. 86. On this construction of the statute it was decided, in an anonymous case in 1 Salk. 280, that a parol promise to pay so much money upon the return of a certain ship was not within the statute, although the ship happened not to return within two years after the promise was made; for that, by possibility, the ship might have returned within a year. So, in the case of *Peter v. Compton* (Skin. 353) it was decided that a promise to pay money to the plaintiff on the day of his marriage was not within the statute, though the marriage did not happen within a year. And it was held by a majority of the judges, that where an agreement is to be performed upon a contingency, and it does not appear in the agreement, that it is to be performed after the year, there a note in writing is not necessary; for the contingency might happen within the year.

This construction of the statute is fully confirmed by the case

of *Fenton v. Emblers*, 3 Burr. 1278. In that case the defendant's testator had promised the plaintiff, that if she would become his housekeeper, he would pay her wages after the rate of £6 *per annum*, and give her, by his last will and testament, a legacy or annuity of £16 by the year, to be paid yearly. The plaintiff, on this agreement, entered into the testator's service, and became his housekeeper, and continued so for more than three years. And the contract, though by parol, was held to be valid and not within the statute, Mr. Justice Dennison declaring his opinion to be (in which opinion the other judges coincided) that the statute of frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed, that a contingency was not within it, nor any case that depended on a contingency, and that it did not even extend to cases where the thing might be performed within the year.

But if it appears clearly that an agreement is not to be performed within a year, and that such is the understanding of the parties, it is within the statute of frauds, although it might be partly performed within that period. Such was the decision in *Boydell v. Drummond*, 11 East, 142. But the performance of the agreement in that case did not depend on the life of either party, or any other contingency. The defendant had agreed to take and pay for a series of large prints from some of the scenes in Shakespeare's plays. The whole were to be published in numbers; and one number, at least, was to be published annually after the delivery of the first. The whole scope of the undertaking shows, as Lord Ellenborough remarks, that it was not to be performed within a year; and if, contrary to all physical probability, it could have been performed within that time, yet the whole work could not have been obtruded upon the subscribers at once, so as to have entitled the publishers to demand payment of the whole subscription from them within the year.

From these authorities it appears to be settled, that in order to bring a parol agreement within the clause of the statute in question, it must either have been expressly stipulated by the parties, or it must appear to have been so understood by them, that the agreement was not to be performed within a year. And this stipulation or understanding is to be absolute and certain, and not to depend on any contingency. And this, we think, is the clear meaning of the statute.

In the present case, the performance of the plaintiff's agree-

ment with the child's father depended on the contingency of her life. If she had continued in the plaintiff's service, and he had supported her, and she had died within a year after the making of the agreement, it would have been fully performed. And an agreement by parol is not within the statute, when by the happening of any contingency it might be performed within a year.

Judgment of the Court of Common Pleas reversed, and a new trial granted.⁴⁴

WARNER *v.* TEXAS & PACIFIC RY. CO.

164 UNITED STATES, 418.—1896.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

This was an action brought May 9, 1892, by Warner against the Texas & Pacific Railway Company, a corporation created by the laws of the United States, upon a contract made in 1874, by which it was agreed between the parties that, if the plaintiff would grade the ground for a switch, and put on the ties, at a certain point on the defendant's railroad, the defendant would put down the rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it. The defendant pleaded that the contract was oral and within the statute of frauds, because it was "not to be performed within one year from the making thereof," and because it was "a grant or conveyance by this defendant of an estate of inheritance, and for a term of more than one year, in lands."

At the trial, the plaintiff, being called as a witness in his own behalf, testified that in 1874 the defendant's agent made an oral contract with him, by which it was agreed that, if he would furnish the ties and grade the ground for the switch, the defendant would put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes, as long as he needed it; that the plaintiff immediately graded the ground for the switch, and got out and put down the ties, and the defendant put down the iron rails, and established the switch; and that the plaintiff, on the faith of the continuance of transportation facilities at the switch, put up

⁴⁴ The case came again before the court. 20 Pick. 506.

a large sawmill, bought many thousand acres of land and timber rights and the water privileges of Big Sandy creek, made a tram road three miles long from the switch to the creek, and otherwise expended large sums of money, and sawed and shipped large quantities of lumber, until the defendant, on May 19, 1887, while its road was operated by receivers, tore up the switch and ties, and destroyed his transportation facilities, leaving his lands and other property without any connection with the railroad. His testimony also tended to prove that he had thereby been injured to the amount of more than \$50,000, for which the defendant was liable, if the contract sued on was not within the statute of frauds.

On cross-examination, the plaintiff testified that when he made the contract he expected to engage in the manufacture of lumber at this place for more than one year, and to stay there, and to have a site for lumber there, as long as he lived; and that he told the defendant's agent, in the conversation between them at the time of making the contract, that there was lumber enough in sight on the railroad to run a mill for ten years, and by moving back to the creek there would be enough to run a mill for twenty years longer.

No other testimony being offered by either party bearing upon the question whether the contract sued on was within the statute of frauds, the Circuit Court, against the plaintiff's objection and exception, ruled that the contract was within the statute, instructed the jury to find a verdict for the defendant, and rendered judgment thereon, which was affirmed by the Circuit Court of Appeals, upon the ground that the contract was within the statute of frauds, as one not to be performed within a year. (13 U. S. App. 236, 54 Fed. 922.) The plaintiff sued out this writ of error.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

The statute of frauds of the State of Texas, re-enacting, in this particular, the English statute of 29 Car. II. c. 3, § 4 (1677), provides that no action shall be brought "upon any agreement which is not to be performed within the space of one year from the making thereof," unless the "agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized." Tex. St. January 18, 1840; 1 Pasch. Dig. (4th ed.) art. 3875; Rev. St. 1879, art. 2464; *Bason v. Hughart*, 2 Tex. 476, 480.

This case has been so fully and ably argued, and the construction of this clause of the statute of frauds has so seldom come before this court, that it will be useful, before considering the particular contract now in question, to refer to some of the principal decisions upon the subject in the courts of England, and of the several States.

In the earliest reported case in England upon this clause of the statute regard seems to have been had to the time of actual performance in deciding that an oral agreement that, if the plaintiff would procure a marriage between the defendant and a certain lady, the defendant would pay him fifty guineas, was not within the statute; Lord Holt saying: "Though the promise depends upon a contingent, the which may not happen in a long time, yet, if the contingent happen within a year, the action shall be maintainable, and is not within the statute." *Francom v. Foster* (1692) Skin. 326; S. C., Holt, 25.

A year later, another case before Lord Holt presented the question whether the words, "agreement not to be performed within one year," should be construed as meaning every agreement which *need* not be performed within the year, or as meaning only an agreement which *could* not be performed within the year, and thus, according as the one or the other construction should be adopted, including or excluding an agreement which might or might not be performed within the year without regard to the time of actual performance. The latter was decided to be the true construction.

That was an action upon an oral agreement, by which the defendant promised, for one guinea paid, to pay the plaintiff so many at the day of his marriage; and the marriage did not happen within the year. The case was considered by all the judges. Lord Holt "was of opinion that it ought to have been in writing, because the design of the statute was, not to trust to the memory of witnesses for a longer time than one year." But the great majority of the judges were of opinion that the statute included those agreements only that were impossible to be performed within the year, and that the case was not within the statute, because the marriage might have happened within a year after the agreement; and laid down this rule: "Where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, then a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenor of the agreement that it is to be

performed after the year, there a note is necessary." *Peter v. Compton* (1693) Skin. 353; S. C., Holt, 326, cited by Lord Holt in *Smith v. Westall*, 1 Ld. Raym. 316, 317; Anon., Comyn, 49, 50; Comb. 463.

Accordingly, about the same time, all the judges held that a promise to pay so much money upon the return of a certain ship, which ship happened not to return within two years after the promise made, was not within the statute, "for that by possibility the ship might have returned within a year; and although by accident it happened not to return so soon, yet, they said, that clause of the statute extends only to such promises where, by the express appointment of the party, the thing is not to be performed within a year." Anon., 1 Salk. 280.

Again, in a case in the king's bench in 1762, an agreement to leave money by will was held not to be within the statute, although uncertain as to the time of performance. Lord Mansfield said that the law was settled by the earlier cases. Mr. Justice Denison said: "The statute of frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it; nor any case that depends upon contingency. It does not extend to cases where the thing only may be performed within the year; and the act cannot be extended further than the words of it." And Mr. Justice Wilmot said that the rule laid down in 1 Salk. 280, above quoted, was the true rule. *Fenton v. Emblers*, 3 Burrows, 1278; S. C., 1 W. Bl. 353.

It thus appears to have been the settled construction of this clause of the statute in England, before the Declaration of Independence, that an oral agreement which, according to the intention of the parties, as shown by the terms of the contract, might be fully performed within a year from the time it was made, was not within the statute, although the time of its performance was uncertain, and might probably extend, and be expected by the parties to extend, and did in fact extend, beyond the year.

The several states of the Union, in re-enacting this provision of the statute of frauds in its original words, must be taken to have adopted the known and settled construction which it had received by judicial decisions in England. *Tucker v. Oxley*, 5 Cranch, 34, 42; *Pennock v. Dialogue*, 2 Pet. 1, 18; *McDonald v. Hovey*, 110 U. S. 619, 628. And the rule established in England by those decisions has ever since been generally recognized in England

and America, although it may, in a few instances, have been warped or misapplied.

The decision in *Boydell v. Drummond* (1809) 11 East, 142, which has been sometimes supposed to have modified the rule, was really in exact accordance with it. In that case the declaration alleged that the Boydells had proposed to publish by subscription a series of large prints from some of the scenes of Shakespeare's plays, in eighteen numbers containing four plates each, at the price of three guineas a number, payable as each was issued, and one number, at least, to be annually published after the delivery of the first; and that the defendant became a subscriber for one set of prints, and accepted and paid for two numbers, but refused to accept or pay for the rest. The first prospectus issued by the publishers stated certain conditions, in substance as set out in the declaration, and others showing the magnitude of the undertaking, and that its completion would unavoidably take a considerable time. A second prospectus stated that one number, at least, should be published annually and the proprietors were confident that they should be enabled to produce two numbers within the course of every year. The book in which the defendant subscribed his name had only, for its title, "Shakespeare Subscribers. Their signatures," without any reference to either prospectus. The contract was held to be within the statute of frauds, as one not to be performed within a year, because, as was demonstrated in concurring opinions of Lord Ellenborough and Justices Grose, LeBlanc, and Bayley, the contract, according to the understanding and contemplation of the parties, as manifested by the terms of the contract, was not to be fully performed (by the completion of the whole work) within the year; and consequently, a full completion within the year, even if physically possible, would not have been according to the terms or the intent of the contract, and could not have entitled the publishers to demand immediate payment of the whole subscription.

In *Wells v. Horton* (1826) 4 Bing. 40; S. C., 12 Moore, C. P. 177, it was held to be settled by the earlier authorities that an agreement by which a debtor, in consideration of his creditor's agreeing to forbear to sue him during his lifetime, promised that his executor should pay the amount of the debt, was not within the statute; and Chief Justice Best said: "The present case is clearly distinguishable from *Boydell v. Drummond*, where, upon the face

of the agreement, it appeared that the contract was not to be executed within a year."

In *Souch v. Strawbridge* (1846), 2 C. B. 808, a contract to support a child, for a guinea a month, as long as the child's father should think proper, was held not to be within the statute, which, as Chief Justice Tindal said, "speaks of 'any agreement that is not to be performed within the space of one year from the making thereof'; pointing to contracts the complete performance of which is of necessity extended beyond the space of a year. That appears clearly from the case of *Boydell v. Drummond*, the rule to be extracted from which is that, when the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but that, where the contract is such that the whole may be performed within a year, and there is no express stipulation to the contrary, the statute does not apply."

In *Murphy v. O'Sullivan* (1866), 11 Ir. Jur. (N. S.) 111, the court of exchequer chamber in Ireland, in a series of careful opinions by Mr. Justice O'Hagan (afterwards Lord Chancellor of Ireland), Baron Fitzgerald, Chief Baron Pigot and Chief Justice Monahan, reviewing the English cases, held that under the Irish statute of frauds of 7 Wm. III. c. 12 (which followed in this respect the words of the English statute), an agreement to maintain and clothe a man during his life was not required to be in writing.

In the recent case of *McGregor v. McGregor* (1888), 21 Q. B. Div. 424, the English court of appeal held that a lawful agreement made between husband and wife, in compromise of legal proceedings, by which they agreed to live apart, the husband agreeing to allow the wife a weekly sum for maintenance, and she agreeing to maintain herself and her children, and to indemnify him against any debts contracted by her, was not within the statute. Lord Esher, M. R., thought the true doctrine on the subject was that laid down by Chief Justice Tindal in the passage above quoted from *Souch v. Strawbridge*. Lord Justice Lindley said: "The provisions of the statute have been construed in a series of decisions from which we cannot depart. The effect of these decisions is that, if the contract can by possibility be performed within the year, the statute does not apply." Lord Justice Bowen said: "There has been a decision which for 200 years has been accepted as the leading case on the subject. In *Peter v. Compton* it was held that 'an agreement that is not to be performed within the space of a year

from the making thereof" means, in the statute of frauds, an agreement which appears from its terms to be incapable of performance within the year." And each of the three judges took occasion to express approval of the decision in *Murphy v. O'Sullivan*, above cited, and to disapprove the opposing decision of Hawkins, J., in *Davey v. Shannon*, 4 Exch. Div. 81.

The cases on this subject in the courts of the several states are generally in accord with the English cases above cited. They are so numerous, and have been so fully collected in Browne on the Statute of Frauds (5th ed. c. 13), that we shall refer to but few of them, beyond those cited by counsel in the case at bar.

[The court then states *Peters v. Westborough*, ante, p. 120.]

In many other States, agreements to support a person for life have been held not to be within the statute. Browne, St. Frauds, c. 13, § 276. The decision of the Supreme Court of Tennessee in *Deaton v. Coal Co.* (12 Heisk. 650), cited by the defendant in error, is opposed to the weight of authority.

[The court then discusses *Roberts v. Rockbottom Co.*, 7 Met. (Mass.) 46; *Blanding v. Sargent*, 33 N. H. 239; *Hinckley v. Southgate*, 11 Vt. 428; *Linscott v. McIntire*, 15 Me. 201; *Herrin v. Butters*, 20 Me. 119; *Broadwell v. Getman*, 2 Denio (N. Y.) 87; *Pitkin v. Long Island Railroad Co.*, 2 Barb. Ch. (N. Y.) 221; *Kent v. Kent*, 62 N. Y. 560; *Saunders v. Kastenbine*, 6 B. Mon. (Ky.) 17; *Railway Co. v. Whitley*, 54 Ark. 199; *Sweet v. Lumber Co.*, 56 Ark. 629.]

The construction and application of this clause of the statute of frauds first came before this court at December term, 1866, in *Packet Co. v. Sickles* (5 Wall. 580), which arose in the District of Columbia under the statute of 29 Car. II. c. 3, § 4, in force in the state of Maryland and in the District of Columbia. Alex. Br. St. Md. 509; *Ellicott v. Peterson*, 13 Md. 476, 487; Comp. St. D. C. c. 23, § 7.

That was an action upon an oral contract, by which a steamboat company agreed to attach a patented contrivance, known as the "Sickles Cut-Off," to one of its steamboats, and, if it should effect a saving in the consumption of fuel, to use it on that boat during the continuance of the patent, if the boat should last so long; and to pay the plaintiffs weekly, for the use of the cut-off, three-fourths of the value of the fuel saved, to be ascertained in a specified manner. At the date of the contract the patent had twelve years to run. The court, in an opinion delivered by Mr. Justice Nelson,

held the contract to be within the statute, and said: "The substance of the contract is that the defendants are to pay in money a certain proportion of the ascertained value of the fuel saved at stated intervals throughout the period of twelve years, if the boat to which the cut-off is attached should last so long." "It is a contract not to be performed within the year, subject to a defeasance by the happening of a certain event, which might or might not occur within that time." (5 Wall. 594—596.) And reference was made to *Birch v. Liverpool* (9 Barn. & C. 392) and *Dobson v. Collis* (1 Hurl. & N. 81), in each of which the agreement was for the hire of a thing, or of a person, for a term specified of more than a year, determinable by notice within the year, and therefore within the statute, because it was not to be performed within a year, although it was defeasible within that period.

In *Packet Co. v. Sickles* it appears to have been assumed, almost without discussion, that the contract, according to its true construction, was not to be performed in less than twelve years, but defeasible by an event which might or might not happen within that time. It may well be doubted whether that view can be reconciled with the terms of the contract itself, or with the general current of the authorities. The contract, as stated in the forepart of the opinion, was to use and pay for the cut-off upon the boat "during the continuance of the said patent, if the said boat should last so long." (5 Wall. 581, 594.) The terms "during the continuance of" and "last so long" would seem to be precisely equivalent, and the full performance of the contract to be limited alike by the life of the patent and by the life of the boat. It is difficult to understand how the duration of the patent and the duration of the boat differed from one another in their relation to the performance or the determination of the contract; or how a contract to use an aid to navigation upon a boat so long as she shall last can be distinguished in principle from a contract to support a man so long as he shall live, which has been often decided, and is generally admitted, not to be within the statute of frauds.

At October term, 1877, this court, speaking by Mr. Justice Miller, said: "The statute of frauds applies only to contracts which, by their terms, are not to be performed within a year, and does not apply because they may not be performed within that time. In other words, to make a parol contract void, it must be apparent that it was the understanding of the parties that it was not to be

performed within a year from the time it was made." And it was therefore held, in one case, that a contract by the owner of a valuable estate, employing lawyers to avoid a lease thereof, and to recover the property, and promising to pay them a certain sum out of the proceeds of the land when recovered and sold, was not within the statute, because all this might have been done within a year; and, in another case, that a contract, made early in November, 1869, to furnish all the stone required to build and complete a lock and dam which the contractor with the State had agreed to complete by September 1, 1871, was not within the statute, because the contractor, by pushing the work, might have fully completed it before November, 1870. *McPherson v. Cox*, 96 U. S. 404, 416, 417; *Walker v. Johnson*, Id. 424, 427.

In Texas, where the contract now in question was made, and this action upon it was tried, the decisions of the Supreme Court of the State are in accord with the current of decisions elsewhere.

[The court then discusses *Thouvenin v. Lea*, 26 Tex. 612; *Thomas v. Hammond*, 47 Tex. 42; *Weatherford, &c. Railway Co. v. Wood*, 88 Tex. 191.]

In the case at bar, the contract between the railroad company and the plaintiff, as testified to by the plaintiff himself, who was the only witness upon the point, was that, if he would furnish the ties and grade the ground for the switch at the place where he proposed to erect a sawmill, the railroad company would "put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it."

The parties may well have expected that the contract would continue in force for more than one year. It may have been very improbable that it would not do so; and it did in fact continue in force for a much longer time. But they made no stipulation which, in terms, or by reasonable inference, required that result. The question is not what the probable, or expected, or actual performance of the contract was, but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year. No definite term of time for the performance of the contract appears to have been mentioned or contemplated by the parties, nor was there any agreement as to the amount of lumber to be sawed or shipped by the plaintiff, or as to the time during which he should keep up his mill.

The contract of the railroad company was with, and for the bene-

fit of, the plaintiff personally. The plaintiff's own testimony shows (although that is not essential) that he understood that the performance of the contract would end with his own life. The obligation of the railroad company to maintain the switch was in terms limited and restricted by the qualification "for the plaintiff's benefit for shipping purposes as long as he needed it," and no contingency which should put an end to the performance of the contract, other than his not needing the switch for the purpose of his business, appears to have been in the mouth or in the mind of either party. If, within a year after the making of the contract, the plaintiff had died, or had abandoned his whole business at this place, or for any other reason had ceased to need the switch for the shipping of lumber, the railroad company would have been no longer under any obligation to maintain the switch, and the contract would have been brought to an end by having been fully performed.

The complete performance of the contract depending upon a contingency which might happen within the year, the contract is not within the statute of frauds as an "agreement which is not to be performed within the space of one year from the making thereof."

Nor is it within the other clause of the statute of frauds, relied on in the answer, which requires certain conveyances of real estate to be in writing. The suggestion made in the argument for the defendant in error, that the contract was, in substance, a grant of an easement in real estate, and as such within the statute, overlooks the difference between the English and the Texan statutes in this particular. The existing statutes of Texas, while they substantially follow the English statute of frauds, so far as to require a conveyance of any "estate of inheritance or freehold, or for a term of more than one year, in lands and tenements," as well as "any contract for the sale of real estate, or the lease thereof for a longer term than one year," to be in writing, omit to re-enact the additional words of the English statute, in the clause concerning conveyances, "or any uncertain interest of, in, to, or out of" lands or tenements, and, in the other clause, "or any interest in or concerning them." St. 29 Car. II. c. 3, §§ 1, 4; Rev. St. Tex. 1879, arts. 548, 2464; Pasch. Dig. arts. 997, 3875; *James v. Fulcrod*, 5 Tex. 512, 516; *Stuart v. Baker*, 17 Tex. 417, 420; *Anderson v. Powers*, 59 Tex. 213.

Judgment reversed, and case remanded to the Circuit Court, with directions to set aside the verdict, and to order a new trial.⁴⁵

ENGINEERING CASES: EXCERPTS FROM DECISIONS.

STATUTE OF FRAUDS.

A contract to furnish a monument for a certain price, to be erected by a state on a battlefield, was held not to be a contract for the sale of goods, within the statute of frauds, though the contractors were not bound to bestow their personal skill and labor thereon. *Forsythe v. Mann* (Vt.), 34 Atl. Rep. 481.

A verbal contract to furnish material, and, after performing labor thereon, to attach it to the realty, as a part of a building in course of construction, is not a sale of goods or chattels, and is not within the statute. *Brown, Etc., v. Wunder* (Minn.), 67 N. W. Rep. 357.

An agreement to take down a building and re-erect it on another lot was held not a sale of goods, but an agreement for labor. *Scales v. Wiley* (Vt.), 33 Atl. Rep. 771.

A bill of parcels, a receipt for money, a vote of a private or municipal corporation duly entered on its books, or a series of letters or of telegrams, may make the necessary memorandum. *Camden I. Wks. v. Fox*, 34 Fed. Rep. 200.

A verbal agreement to make annual payments on a contract which was to continue sixteen years is within the statute, and cannot be enforced. *Jackson Iron Co. v. Negaunee C. Co.*, 65 Fed. Rep. 298.

A verbal contract to construct a road or a house within a year and twenty days from the date thereof was held valid, as it might be completed within the year. *Jones v. Pouch*, 41 Ohio St. 146.

A verbal contract to deliver ties, etc., on the line of a railroad, to be inspected once a month and paid for at current prices, the

⁴⁵ A contract to marry is not within this clause of the statute of frauds. *Lewis v. Tapman* (Md.), 45 Atl. 459; citing *Derby v. Phelps*, 2 N. H. 515; *Nichols v. Weaver*, 7 Kans. 373; *Ullman v. Meyer*, 10 Fed. Rep. 241; *Contra, Brick v. Gannar*, 36 Hun (N. Y.) 52; *Blackburn v. Mann*, 85 Ill. 222.

contract to continue until the contractor is notified to stop, is not within the statute. *Walker v. Railroad Co.* 1 S. E. Rep. 366.

A contract to build a house for \$2,400—\$500 when the house is begun, \$500 when the house is finished and the residue in five yearly payments, with interest payable semi-annually,—was held not within the statute, the contract having been wholly performed by the contractor within the year. The contract had been reduced to writing but never signed. *Durfee v. O'Brien*, 14 Atl. Rep. 857; *Haines v. Thompson*, 19 N. Y. Supp. 184.

A verbal contract for employment by the year, made some time before the service begins, will not hold. *Moody v. Jones* (Tex.), 37 S. W. Rep. 379.

CONTRACTS FOR AN INTEREST IN LANDS.

The Statute of Frauds applies to contracts concerning the use of a party wall: *Rice v. Roberts*, 24 Wis. 461; to the sale of bricks of an unused house still standing: *Meyers v. Schemp*, 67 Ill. 469; and to the preparation of the plans of a building and the superintendence of its construction, in consideration of the conveyance of a certain lot: *Koch v. Williams* (Wis.), 52 N. W. Rep. 257.

A parol agreement to pay for labor upon land already furnished or to be furnished, is not within the statute. *Scales v. Wiley* (Vt.), 33 Atl. Rep. 771.

An agreement to pay one-half the cost of a party wall is not within the statute. *Stuht v. Sweezy* (Neb.), 67 N. W. Rep. 748.

A parol agreement between owners of adjoining lands determining the boundaries, followed by possession, is valid and binding. *Archer v. Helin* (Miss.), 11 So. Rep. 3.

A contract to open a street and an agreement not to build a structure within a certain distance from the street have been held within the statute. 8 *Amer. & Eng. Ency. Law*, 703.

The statute does not apply to an agreement which releases a claim for damages to land by the overflow of a mill-pond. *Smith v. Goulding*, 6 Cush. (Mass.) 154.

TO PAY THE DEBT OF ANOTHER.

A contractor who intended to stop work on his contract was assured by a third party that he would see that he got his money if he went on with the work. It was held that as to the work already performed the promise was a collateral undertaking to pay the debt

of another, which, being without consideration and not in writing, was void. *Gable v. Graybill*, 1 Pa. Super. Ct. Rep. 29.

An oral promise by an owner to pay a subcontractor upon the abandonment of the work by the original contractor, a sum already due him from the latter, and a promise to pay him for extra work if he will go ahead and complete the contract, is not void as a promise to answer for the debt of another. *Andre v. Bowman*, 13 Md. 241.

A subsequent promise by the owner to a material-man to see that materials furnished in the construction of the owner's house upon the contractor's credit were paid for is not enforceable, and will not support a personal judgment against the owner. The promise was held to be a mere verbal collateral contract. *Farnham v. Davis* (Me.), 9 Atl. Rep. 725 (1887).

SECTION V.

PARTIES.

In the previous topics discussed, we have taken up the elements of contract, the bringing together of the parties by offer and acceptance, and the consideration of a form which the courts will regard as legal. This agreement may, however, be made between parties incapable of making a valid contract from the legal point of view. The following persons, natural or artificial, are either partially or wholly incapable of making a valid contract:

- (a) *Minors.*
- (b) *Corporations.*
- (c) *Lunatics and inebriates.*
- (d) *Married women.*

(a) *Minors.*

1. The contract of a minor¹ for the appointment of an agent is

¹ All persons under the age of twenty-one are minors at common law. Legally they are termed infants. The age of majority for women is fixed at eighteen in some states. Stimson, Am. St. Law, § 6601. Majority is reached on the first minute of the day preceding the twenty-first birthday. *Bardwell v. Purrington*, 107 Mass. 419; *Hamlin v. Stevenson*, 4 Dana (Ky.) 597.

void;² for necessities³ it is binding; for all other matters it is avoidable at his election.⁴ The adult, however, is bound until the contract is avoided by the minor.⁵

2. If a minor becomes incapable of avoiding or confirming a contract because of death, insanity or other disability, such action may be taken by his heirs,⁶ personal representative⁷ or conservator.⁸ The guardian of a minor cannot, however, exercise this right.⁹

3. A minor may avoid his contract even if he has falsely represented his age in making it. The doctrine of estoppel *in pais* does not apply. To allow him to make his contract valid by such a representation would be to defeat the law designed for his protection.¹⁰

4. If a minor has received money or property on a contract which he tries to avoid, he is obliged to restore the same if it is possible to do so.¹¹

5. A minor may avoid a contract:

- (a) Before attaining majority,¹² or
- (b) Before ratification after attaining majority.¹³

6. A minor may confirm a voidable contract after reaching his majority:

- (a) By ratifying it.¹⁴

² *Trueblood v. Trueblood*, 8 Ind. 195; *Lawrence v. McArter*, 10 Ohio 37; *Knox v. Flack*, 22 Pa. St. 337; *Cole v. Penmoyer*, 14 Ill. 159.

³ *Tupper v. Cadwell*, 12 Met. 562; *McKanna v. Merry*, 61 Ill. 179; *Johnson v. Lines*, 6 W. & S. 80; *Mason v. Wright*, 13 Met. 306.

⁴ *Fetrow v. Wiseman*, 40 Ind. 148; *Beardsley v. Hotchkiss*, 96 N. Y. 211; *Reed v. Batchelder*, 1 Met. (Mass.) 559; *Tucker v. Moreland*, 10 Pet. U. S. 58, 71.

⁵ *Field v. Herrick*, 101 Ill. 110; *Thompson v. Hamilton*, 12 Pick. 425, 429.

⁶ *Illinois Land Co. v. Bonner*, 75 Ill. 315.

⁷ *Parsons v. Hill*, 8 Mo. 135.

⁸ *Chandler v. Simmons*, 97 Mass. 508.

⁹ *Oliver v. Houdlet*, 13 Mass. 240.

¹⁰ *Sims v. Everhardt*, 102 U. S. 300; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40.

¹¹ *Price v. Furman*, 27 Vt. 268; *Brandon v. Brown*, 106 Ill. 519, 527; *Green v. Green*, 69 N. Y. 553, 556; *Chandler v. Simmons*, 97 Mass. 508, 514.

¹² *Chapin v. Shafer*, 49 N. Y. 407; *Shipman v. Horton*, 17 Conn. 481; *Ray v. Haines*, 52 Ill. 485; *Vent v. Osgood*, 19 Pick. 572.

¹³ *Walker v. Ellis*, 12 Ill. 470; *Dixon v. Merritt*, 21 Minn. 196, 200; *Mustard v. Wohlford*, 15 Grat. (Va.) 329.

¹⁴ *Goodsell v. Myers*, 3 Wend. 479; *Hale v. Gerrish*, 8 N. H. 374; *Whitney v. Dutch*, 14 Mass. 460; *Keener v. Crull*, 19 Ill. 191.

- (b) By acts which indicate his intention of confirming it.¹⁵
- (c) By his failure to disaffirm it within a reasonable length of time¹⁶ or within the statutory period.

(b) *Corporations.*

1. The capacity of a corporation to contract is limited to the powers conferred upon it by the act of incorporation.¹⁷

2. If a corporation does enter into a contract which is beyond its powers;¹⁸ and either party receives the benefits therefrom in money, services, etc.,¹⁹ an action will lie in favor of the other party.²⁰

3. A corporation may make any contract within its powers, unless it is restricted, in the same way as would an individual under similar circumstances.²¹ In cases where a natural person is required to contract under seal, a corporation also is so required to contract.²²

(c) *Lunatics and Inebriates.*

1. The contract of a lunatic²³ or inebriate²⁴ for necessities is binding, even though he is under a conservator.²⁵

¹⁵ *Boyden v. Boyden*, 9 Met. 519; *Henry v. Root*, 33 N. Y. 551; *Keegan v. Cox*, 116 Mass. 289; *Minock v. Shortridge*, 21 Mich. 304.

¹⁶ *Walsh v. Powers*, 43 N. Y. 23; *Boyden v. Boyden*, 9 Met. (Mass.) 519; *Sims v. Everhardt*, 102 U. S. 312; *Prout v. Wiley*, 28 Mich. 164; *Davis v. Dudley*, 70 Me. 236.

¹⁷ *Thomas v. R. R. Co.*, 101 U. S. 82; *Davis v. R. R. Co.*, 131 Mass. 259; *Louisville R. R. Co. v. Letson*, 2 How. 558; *Metropolitan Bank v. Godfrey*, 23 Ill. 602.

¹⁸ It is said to be *ultra vires*.

¹⁹ *Rider Life Raft Co. v. Roach*, 97 N. Y. 381; *Madison Ave. Ch. v. Oliver St. Ch.*, 73 N. Y. 90; *Whitney Arms Co. v. Barlow*, 63 N. Y. 70; *Slater Woolen Co. v. Lamb*, 143 Mass. 422.

²⁰ *Brown v. Mortgage Co.*, 110 Ill. 235; *P. & S. R. R. Co. v. Thompson*, 103 Ill. 187; *E. St. Louis v. E. St. Louis &c. Co.*, 98 Ill. 415; *Slater Woolen Co. v. Lamb*, 143 Mass. 420; *Brunswick Gas Light Co. v. United Gas Fuel & Light Co.*, 85 Me. 532; *Central Tran. Co. v. Pullman Car Co.*, 139 U. S. 24.

²¹ *Peterson v. Mayor of New York*, 17 N. Y. 453; *Moss v. Averell*, 10 N. Y. 454; *Proprietors of Bridge v. Gordon*, 1 Pick. (Mass.) 304; *New Athens v. Thomas*, 82 Ill. 259.

²² *Mott v. Hicks*, 1 Cow. (N. Y.) 513; *Bank of Columbia v. Patterson*, 7 Cranch (U. S.) 299; *Hamilton v. Lycoming &c. Co.*, 5 Pa. St. 339.

²³ *Ingraham v. Baldwin*, 9 N. Y. 48; *Shaw v. Thompson*, 16 Pick. (Mass.) 200; *La Rue v. Gilkyson*, 4 Pa. St. 375; *Seera v. Truc*, 53 N. H. 627.

²⁴ *Gore v. Gibson*, 13 M. & W. 626, 627.

²⁵ *Sawyer v. Lufkin*, 56 Me. 308; *McCrillis v. Bartlett*, 8 N. H. 569; *Fruitt v. Anderson*, 12 Ill. App. 421.

2. A lunatic may make a binding contract during a sane period,²⁶ or an inebriate during a sober period,²⁷ and either may ratify or disaffirm at those times a voidable contract made while insane²⁸ or intoxicated.

3. A contract other than for necessities, and which is beyond the comprehension of the lunatic or inebriate,²⁹ is voidable in his favor if the same person knew of the other's incapacity.³⁰ If he is apparently sane, is not under a conservator, and the other contracting party has no reason to believe him insane, the contract is not voidable.³¹

(d) *Married Women.*

Formerly a married woman could not contract, but under the statutes now existing in all the States, she may contract, may sue and be sued, as freely as an unmarried woman. As there is a wide variation in the statutes of the different States, an engineer or contractor should be fully informed as to the provisions of the statute in the particular jurisdiction in which he wishes to contract with married women. Great care should be exercised also in inquiring into the marital relations of the parties and the law governing them before entering upon engineering work.

1. Under the New York Married Woman's Property Acts a married woman's contracts may be enforced against her separate estate in three cases:

²⁶ *Hall v. Warren*, 9 Ves. (Eng.) 605; *Lilly v. Waggoner*, 27 Ill. 395; *McCormick v. Littler*, 85 Ill. 62.

²⁷ *Caulkins v. Fry*, 35 Conn. 170; *Wait v. Maxwell*, 5 Pick. (Mass.) 217; *Ritter's Appeal*, 9 P. F. Sm. 9.

²⁸ *Arnold v. Richmond Iron Wks.*, 1 Gray. (Mass.) 434; *Van Wyck v. Brasher*, 81 N. Y. 260; *Barrett v. Buxton*, 2 Aik. (Vt.) 167; *Carpenter v. Rodgers*, 61 Mich. 384.

²⁹ *Dennett v. Dennett*, 44 N. H. 531, 537; *Titcomb v. Vantyle*, 84 Ill. 371; *English v. Porter*, 109 Ill. 285.

³⁰ *Ingraham v. Baldwin*, 9 N. Y. 48; *Arnold v. Richmond Iron Wks.*, 1 Gray. (Mass.) 434; *Allis v. Billings*, 6 Met. (Mass.) 415, 417; *Johns v. Fritchey*, 39 Md. 258; *Shackleton v. Seabee*, 86 Ill. 616; *Crawford v. Scovell*, 94 Pa. St. 48; *Wadsworth v. Sharpsteen*, 8 N. Y. 388; *Carter v. Beckwith*, 128 N. Y. 312.

³¹ *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Lancaster Co. Bank v. Moore*, 78 Pa. St. 407; *Young v. Stevens*, 48 N. H. 133; *Gribben v. Maxwell*, 34 Kans. 8; *Brodrib v. Brodrib*, 56 Cal. 563; *Copenrath v. Kienby*, 83 Ind. 18.

- (a) When created in or about carrying on a trade or business of the wife;
- (b) When relating to or made for the benefit of her separate estate;
- (c) When the intention to charge the separate estate was expressed in the instrument or contract by which the liability was created.⁸²

2. In New York a married woman may enter into contracts with her husband, except such as affect the marital relation or his liability for her support.⁸³

CASES.

SECTION V.—PARTIES.

Minors.

TRUEBLOOD *v.* TRUEBLOOD.

8 INDIANA, 195.—1856.

Appeal from the Vigo Circuit Court.

PERKINS, J. Bill in chancery, under the old practice, to compel a specific performance, and so set aside a fraudulent deed. Bill dismissed. The facts of the case, so far as material to its decision, are as follows:

In 1845, William Trueblood was an infant, and owner of a piece of land. At that date, Richard J. Trueblood, the father of said William, executed a title-bond to one Nathan Trueblood, whereby he obligated himself to cause to be conveyed to him, said Nathan, the piece of land belonging to William, after the latter should become of age. The conveyance was to be upon a stated consideration. The bond is single—simply the bond of Richard—and William is nowhere mentioned in it as a party, but his name is signed with his father's at the close of the condition, as may be supposed, in signification of his assent to the execution of the instrument by his father. We shall so treat his signature to the bond.

After William became of age, it is claimed that he ratified the bond, and afterwards sold and conveyed the land to another—

⁸² *Manhattan Brass &c. Co. v. Thompson*, 58 N. Y. 80 (1874).

⁸³ Stimson, Am. St. Law, § 6480.

Robert Lockridge—who had notice, etc. This bill was filed in order to have the deed to Lockridge set aside, and a conveyance decreed to Nathan Trueblood, pursuant to the terms of the bond.

The court below, as we have stated, refused to enter such a decree, and held, as counsel inform us, that the bond was not susceptible of ratification by William Trueblood; and whether it was or not is the important question in the case; for if the bond was not susceptible of such ratification, we need not inquire into the alleged facts which it is claimed evidence that such an act had been done.

As we have seen, the bond is not, in terms, the bond of William Trueblood. He could not, by virtue of its express provisions, be sued upon it. Where a father signs his name to articles of apprenticeship of his son, simply to signify his assent to them, he cannot be a party to a suit upon the articles. 5 Ind. R. 538.

If the bond, then, can in any light be regarded as the contract of William Trueblood, it must be because his father may be considered his agent in executing it. Can, then, an infant, after arriving at age, ratify the act of his agent, performed while he was an infant? This depends upon whether his appointment of an agent is a void or voidable act. If the former, it cannot be ratified (5 Ind. R. 353); if the latter, it can be. Reeves' Dom. Rel. 240.

In the first volume of American Leading Cases (3d ed., p. 248, *et seq.*) the doctrine is laid down, as the result of the American cases on the subject, that the only act an infant is incapable of performing, as to contracts, is the appointment of an agent or attorney. Whether the doctrine is founded in solid reasons, they admit, may be doubted; but assert that there is no doubt but that it is law. See the cases there collected.

The law seems to be held the same in England. In *Doe v. Roberts* (16 M. and W. 778), a case slightly like the present in some respects, the attorney, in argument, said: "Here a tenancy has been created, either by the children, or by Hugh Thomas, acting as their agent." Parke, B., replied: "That is the fallacy of your argument. An agreement by an agent cannot bind an infant. If an infant appoints a person to make a lease, it does not bind the infant, neither does his ratification bind him. There is no doubt about the law; the lease of an infant, to be good, must be his own personal act." So, here, had the bond been the personal act of the infant, he could have ratified it. It would have been simply voidable. But the bond of his agent, or one having assumed to act as such, is void, and not capable of being ratified. See 8 Blackf. 345.

The decree below must, therefore, be affirmed with costs.

GOOKINS, J., having been concerned as counsel, was absent.
Per Curiam. The decree is affirmed with costs.³⁴

“From a careful examination of the modern decisions and text writers, we are satisfied that the following propositions may be regarded as settled: first, that an infant’s contracts for necessities are as valid and binding upon the infant as the contracts of an adult, and that such contracts cannot be disaffirmed, and need not be ratified before they can be enforced; second, the contract of an infant appointing an agent or attorney in fact is absolutely void and incapable of ratification; third, any contract that is illegal, by reason of being against a statute or public policy, is absolutely void and incapable of ratification; fourth, all other contracts made by an infant are voidable only, and may be affirmed or disaffirmed by the infant at his election when he arrives at his legal majority. The second proposition may not be founded in solid reason, but it is so held by all the authorities.” *Fetrow v. Wiseman*, 40 Ind. 148, 155. See also *Harner v. Dipple*, 31 Ohio St. 72; *Mustard v. Wohlford’s Heirs*, 15 Gratt. (Va.) 329.

Corporations.

SLATER WOOLEN CO. *v.* LAMB.

143 MASSACHUSETTS, 420.—1887.

Action upon contract for goods sold and delivered.

Contract, upon an account annexed for goods sold and delivered.

FIELD, J. If we assume that the truth of the exceptions has been established, we think that they must be overruled. The substance of the defendant’s contentions is, that the Slater Woollen Company, having been incorporated “for the purpose of manufacturing fabrics of wool and worsted or of a mixture thereof with other textile materials,” could not, by and in the name of persons who were in fact keeping a store as its agents, but whose agency was undisclosed, sell groceries, dry goods, and other similar articles to the defendant, who was not employed by the company, and then maintain an action against him to recover either the price or the value of the goods sold.

³⁴ But see *Hastings v. Dollarhide*, 24 Cal. 195 (1864); *Hardy v. Waters*, 38 Me. 450 (1853), holding that the transfer by indorsement of a promissory note by the agent of an infant payee is voidable and not void.

If the goods were the property of the plaintiff, and were sold by its agents, the plaintiff can sue as an undisclosed principal.

It was said of *Chester Glass Co. v. Dewey* (16 Mass. 94) in *Davis v. Old Colony Railroad* (131 Mass. 258, 273) that "the leading reason assigned was, 'the legislature did not intend to prohibit the supply of goods to those employed in the manufactory'; in other words, the contract sued on was not *ultra vires*. That reason being decisive of the case, the further suggestion in the opinion, 'Besides, the defendant cannot refuse payment on this ground; but the legislature may enforce the prohibition by causing the charter to be revoked, when they shall determine that it has been abused,' was, as has been since pointed out, wholly *obiter dictum*." But the weight of authority, we think, supports the last reason given in its application to the facts of the present case. There is a distinction between a corporation making a contract in excess of its powers, and making a contract which it is prohibited by statute from making, or which is against public policy or sound morals; and there is also a distinction between suing for the breach of an executory contract and suing to recover the value of property which has been received and retained by the defendant under a contract executed on the part of the plaintiff.

If it be assumed, in favor of the defendant, that the contracts of sale in the case at bar were *ultra vires* of the corporation, they were not contracts which were prohibited, or contracts which were void as against public policy or good morals; the defect in them is, that the corporation exceeded its powers in making them. The defendant, under these contracts, has received the goods and retained and used them. Either the corporation must lose the value of its property, or the defendant must pay for it; in such an alternative, courts have held, on one ground or another, that an action can be maintained when the sole defect is a want of authority on the part of the corporation to make the contract. We think that the corporation can maintain an action of contract against the defendant to recover the value of the goods. The defendant is not permitted to set up this want of authority as a defense; and as the form of the transaction was that of contract, such should be the form of the action.

We are not required to determine whether an action can be maintained to recover the price, as distinguished from the value of the goods, as no exception has been taken to the measure of damages. *Chester Glass Co. v. Dewey*, *ubi supra*; *Whitney Arms Co. v. Bar-*

low, 63 N. Y. 62; *Woodruff v. Erie Railroad*, 93 N. Y. 609; *Nassau Bank v. Jones*, 95 N. Y. 115; *Pine Grove Township v. Talcott*, 19 Wall. 666, 679; *National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99. See *Whitney v. Leominster Savings Bank*, 141 Mass. 85; *Bowditch v. New England Ins. Co.*, 141 Mass. 292; *Wright v. Pipe Line Co.*, 101 Penn. St. 204.

Exceptions overruled.³³

Gray, J., in *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 60 (1890):

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money parted with on faith of the unlawful contract, to be recovered back or compensation to be made for it."

Lunatics and Inebriates.

GRIBBEN v. MAXWELL.

34 KANSAS, 8.—1885.

Error from Cowley District Court.

Action brought December 7, 1883, by Noah Gribben, as guardian of Olive E. Gribben, a lunatic, against Samuel E. Maxwell, to set aside a conveyance executed by Olive E. Gribben on June 11, 1883.

HORTON, C. J. As a general rule, the contract of a lunatic is void *per se*. The concurring assent of two minds is wanting. "They who have no mind cannot 'concur in mind' with one another; and

"In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm the unlawful contract."

Walton, J., in *Brunswick Gas Light Co. v. United Gas Fuel & Light Co.*, 85 Me. 532, 541 (1893):

"But it is claimed that, inasmuch as the defendant company took and

³³ Upon the last point in the foregoing opinion:

held possession of the plaintiff company's works by virtue of the lease, *ultra vires* is no defense to an action to recover the agreed rent. We do not doubt that the plaintiff company is entitled to recover a reasonable rent for the time the defendant company actually occupied the works, but do not think the amount can be measured by the *ultra vires* agreement. We think that in such cases the recovery must be had upon an implied agreement to pay a reasonable rent; and that while the *ultra vires* agreement may be used as evidence, in the nature of an admission, of what is a reasonable rent, it cannot be allowed to govern or control the amount. It seems to us that it would be absurd to hold that the *ultra vires* lease is void, and at the same time hold that it governs the rights of the parties with respect to the amount of rent to be recovered. A void instrument governs nothing. We think the correct rule is the one stated by Mr. Justice Gray in a recent case in the United States Supreme Court. He said that a contract made by a corporation which is unlawful and void, because beyond the scope of its corporate powers, does not by being carried into execution become lawful and valid, and that the proper remedy of the aggrieved party is to disaffirm the contract and sue to recover as on a *quantum meruit* the value of what the defendant has actually received the benefit of. *Pittsburgh &c. v. Keokuk &c.*, 131 U. S. 371. We think this is the correct rule. 2 *Beach on Corp.* § 423, and cases there cited."

On the other hand, the doctrine of equitable estoppel to prevent defendant from relying upon the invalidity of the contract is applied in *Denver Fire Ins. Co. v. McClland*, 9 Col. 11, 22 (1885).

as this is the essence of a contract, they cannot enter into a contract." 1 *Parsons on Contracts* (6th ed.), 383; *Powell v. Powell*, 18 Kas. 371. Notwithstanding this recognized doctrine, the decided cases are far from being uniform on the subject of the liability or extent of liability of lunatics for their contracts. An examination of the cases upon the subject shows that there is an irreconcilable conflict in the authorities. We think, however, the weight of authority favors the rule that where the purchase of real estate from an insane person is made, and a deed of conveyance is obtained in perfect good faith, before an inquisition and finding of lunacy, for a sufficient consideration, without knowledge of the lunacy, and no advantage is taken by the purchaser, the consideration received by the lunatic must be returned, or offered to be returned, before the conveyance can be set aside at the suit of the alleged lunatic, or one who represents him.

WRIGHT, C. J., in *Corbit v. Smith* (7 Iowa, 60), thus states the law:

"In the next place, a distinction is to be borne in mind between contracts *executed* and contracts *executory*. The latter the courts will not in general

lend their aid to execute where the party sought to be affected was at the time incapable, unless it may be for necessities. If, on the other hand, the incapacity was unknown, no advantage was taken, the contract has been executed, and the parties cannot be put *in statu quo*, it will not be set aside."

In *Behrens v. McKenzie* (23 Iowa, 333) Dillon, J. said:

"But with respect to executed contracts, the tendency of modern decision is to hold persons of unsound mind liable in cases where the transaction is in the ordinary course of business, is fair and reasonable, and the mental condition was not known to the other party, and the parties cannot be put *in statu quo*."

In *Allen v. Berryhill* (27 Iowa, 534) it was decided that:

"Where a contract made by an insane person has been adopted, and is sought to be enforced by the representatives of such person, it is no defense to the sane party to show that the other party was *non compos mentis* at the time the contract was made."

COLE, J., dissenting, expressed his views as follows:

"In every case of contract with a lunatic, which has been executed in whole or in part, the fact that the parties can or cannot be placed *in statu quo*, will have an important bearing in determining whether such contract shall stand. . . . When the parties cannot be placed *in statu quo*, and the contract is fair, was made in good faith and without knowledge of the lunacy, it will not be set aside, even at the suit of the lunatic. And this, not because the contract was valid or binding, but because an innocent party, one entirely without fault or negligence, might, and in the eyes of the law would, be prejudiced by setting it aside. Both parties are faultless, and therefore stand equal before the law, and in the forum of conscience. The law will not lend its active interposition to effectuate a wrong or prejudice to either; it will suffer the misfortune to remain where nature has cast it."

In *Bank v. Moore* (78 Pa. St. 407) a lunatic was held liable upon a note discounted by him at the bank; and Mr. Justice Paxson, in delivering the opinion of the court, said, among other things:

"Insanity is one of the most mysterious diseases to which humanity is subject. It assumes such varied forms and produces such opposite effects as frequently to baffle the ripest professional skill and the keenest observation. In some instances it affects the mind only in its relation to or connection with the particular subject, leaving it sound and rational upon all other subjects. Many insane persons drive as thrifty a bargain as the shrewdest business man without betraying in manner or conversation the

faintest trace of mental derangement. It would be an unreasonable and unjust rule that such persons should be allowed to obtain the property of innocent parties and retain both the property and its price. Here the bank in good faith loaned the defendant the money on his note. The contract was executed, so far as the consideration is concerned, and it would be alike derogatory to sound law and good morals that he should be allowed to retain it to swell the corpus of his estate."

Mr. Pomeroy, in his treatise on Equity Jurisprudence, says:

"In general a lunatic, idiot, or person completely *non compos mentis*, is incapable of giving a true consent in equity, as at law; his conveyance or contract is invalid, and will generally be set aside. While this rule is generally true, the mere fact that a party to an agreement was a lunatic will not operate as a defense to its enforcement or as ground for its cancellation. A contract, executed or executory, made with a lunatic in good faith without any advantage taken of his position, and for his own benefit, is valid both in equity and at law. And where a conveyance or contract is made in ignorance of the insanity, with no advantage taken, and with perfect good faith, a court of equity will not set it aside if the parties cannot be restored to their original position, and injustice would be done." 2 Pomeroy's Eq. Juris. § 946, p. 465. See also *Scanlan v. Cobb*, 85 Ill. 296; *Young v. Stevens*, 48 N. H. 133; *Eaton v. Eaton*, 37 N. J. L. 108; *Freed v. Brown*, 55 Ind. 310; *Ashcraft v. De Armond*, 44 Iowa 229.

Applying the law thus declared to the case at bar, the District Court committed no error in overruling the demurrer. It appears from the pleadings that the conveyance was executed and delivered before an inquisition and finding of lunacy; that no offer was made to return to the purchaser his money paid for the conveyance of the land; and the answer sets forth good faith on the part of the purchaser; that he paid a fair and reasonable price for the land; that he had no knowledge or information of the lunacy of Olive E. Gribben, the ward of the plaintiff; that there was nothing in her looks or conduct at the time to indicate that she was of unsound mind, or incapable of transacting business; but, on the contrary, that she was apparently in possession of her full mental faculties, and was then, and had been for a long time prior, engaged in the transaction of business for herself.

Our attention is called to the case of *Powell v. Powell*, *supra*, as decisive that the conveyance in question is void; but a consideration of the views above expressed and the authorities cited show that all the reasons to avoid a marriage with a lunatic do not apply in the case of a deed obtained in good faith from a lunatic, executed before an inquisition and finding of lunacy. We have examined

fully the authorities on the other side of the question, and especially *In the matter of DeSilver*, 5 Rawle (1835), 110; *Gibson v. Soper*, 6 Gray, 279; *Van Deusen v. Sweet*, 51 N. Y. 378; *Dexter v. Hall*, 82 U. S. 9.

Notwithstanding the recognized ability of the judges rendering these decisions, we are better satisfied with the doctrine herein announced.

The order and judgment of the District Court will be affirmed. All the Justices concurring.³⁶

ENGINEERING CASES: EXCERPTS FROM DECISIONS.

CORPORATIONS.

A railroad company has no authority to employ a mining engineer to examine mining properties unless its charter permits it, and without such powers it is not liable to him for his services. *Georg v. Nevada Central R. R. Co.* (Nev.), 38 Pac. Rep. 441.

A railroad company cannot contract to build the road of another company in a different state, even though it may construct a branch to its own road in that state. *Bostwick v. Chapman*, 60 Conn. 551; *Cunningham v. Massena Sp. R. Co.*, 63 Hun. (N. Y.) 439, 18 N. Y. Supp. 600.

It has been held that the reconstruction of a building which had been moved to make room for the extension of a street is outside the powers of a village corporation. *Screery v. Springfield*, 112 Mass. 512 (1873).

A city or company may have a fixed limit to the amount of indebtedness which it may assume, and when this is reached it cannot create a further debt. *State v. Atlantic City* (N. J.), 9 Atl. Rep. 759 (1887).

If a contract with a city is in excess of the amount appropriated for the purpose of the construction, such excess cannot be recovered. *Atlantic City W. W. Co. v. Reed* (N. J.), 15 Atl. Rep. 10.

A contract is void as to the excess of indebtedness above the

³⁶ See also *Young v. Stevens*, 48 N. H. 133.

amount fixed by law for a certain construction. *Kingsley v. Brooklyn*, 78 N. Y. 200 (1879); *Boston Elec. Lt. Co. v. Cambridge (Mass.)*, 39 N. E. Rep. 787.

SECTION VI.

REALITY OF CONSENT.

We have discussed under offer and acceptance the mutual assent required to make a valid contract. There remains another phase of consent to be more fully treated, viz., the reality of the consent; it may be only apparently real so that if the contract were enforced as it appears on the face of it, it would work a hardship to the innocent party. The minds of the parties should conceive the same idea, that is, mean to bind themselves to the same thing. When a person agrees to do an act or make a promise under a misapprehension or a deception, he is not really consenting; true mutuality is absent; the assent is only apparent. If he knew the facts as they actually existed he would not so bind himself. Hence a person may be induced to contract by means of mistake, misrepresentation, fraud, duress or undue influence, and a certain kind of consent be obtained, which the innocent party may have set aside by the courts, and for which he will not be held responsible. In many cases the injured party may avoid the contract either at law or in equity, but in some his only remedy is in equity. He must seek relief within a reasonable length of time after he learns of the mistake,¹ misrepresentation or fraud,² or after the duress³ or undue influence⁴ has been discontinued.

(a) *Mistake.*

The parties may not have meant the same thing; or while the same thing, one or the other may have formed a wrong conclusion as to the subject-matter of the contract. This is known as mistake.

¹ *Thomas v. Bartow*, 48 N. Y. 193; *Dodge v. Ins. Co.*, 12 Gray. (Mass.) 71; *Grymes v. Sanders*, 93 U. S. 55, 61.

² *Baird v. Mayor*, 96 N. Y. 567; *Schiffer v. Dietz*, 83 N. Y. 300; *Baker v. Lever*, 67 N. Y. 304, 308; *Nealon v. Henry*, 131 Mass. 153, 155; *Bassett v. Brown*, 105 Mass. 551, 556.

³ *Sims v. Everhardt*, 102 U. S. 311; *Haldane v. Sweet*, 55 Mich. 196.

⁴ *Jenkins v. Pye*, 12 Pet. (U. S.) 241, 261; *McCormick v. Malin*, 5 Blackf. (Ind.) 509, 532; *Marston v. Simpson*, 54 Cal. 189,

Mistake of intention should be distinguished from mistake of expression. In the latter case the parties are fully agreed, but their written words do not convey the true meaning of their agreement. Where there never was an agreement in offer and acceptance we cannot say there is a mistake, for there never was assent.⁵

1. A contract may be avoided when there has been a mistake as to the nature of the transaction.⁶ For instance, where a person unable to read signs a deed, thinking that it is an instrument of another character, he may avoid the obligation, for his consent did not accompany his signature.

2. A contract cannot be avoided when a mistake has been made due to negligence, for such negligence will operate as an estoppel.⁷ Where a person who is able to read but does not do so executes a deed, supposing it to be a lease, and thereby makes it possible for his grantee to sell the property to an innocent purchaser for value, he is bound by the contract.

3. A mistake as to the identity of the other contracting party⁸ is ground for setting aside a contract. Where A buys goods of B thinking he is dealing with C, B cannot make himself a party to the transaction without revealing his identity to A.

4. A mistake as to the identity⁹ or existence¹⁰ of the subject-matter is sufficient to avoid the agreement. Where A agrees to buy of B a boat of a certain size and design, and B has two boats answering the description, and means to sell one while A intends to buy the other, there is no real consent, for the parties have not the same article in mind. Where A agrees to buy of B a certain house, which without their knowledge burned up just before the making of the agreement, there is no binding contract, for the subject-matter is non-existent.

⁵ *Rowland v. New York &c. R.*, 61 Conn. 103; *Greene v. Bateman*, 10 Fed. Cas. 1126.

⁶ *Trambly v. Ricard*, 130 Mass. 259; *Van Brunt v. Singley*, 85 Ill. 281.

⁷ *Chapman v. Rose*, 56 N. Y. 137; *Upton v. Tribilecock*, 91 U. S. 50; *Ganavan v. Bryant*, 83 Ill. 376.

⁸ *Boston Ice Co. v. Potter*, 123 Mass. 28; *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184.

⁹ *People's Bank v. Bogart*, 81 N. Y. 101; *Cutts v. Guild*, 57 N. Y. 229; *Harvey v. Harris*, 112 Mass. 32; *Kyle v. Kavanaugh*, 103 Mass. 356; *Laidlaw v. Organ*, 2 Wheat. (U. S.) 178; *Wheat v. Cross*, 31 Md. 99; *Parrish v. Thurston*, 87 Ind. 437.

¹⁰ *Duncan v. New York Mut. Ins. Co.*, 138 N. Y. 88; *Allen v. Hammond*, 11 Pet. (U. S.) 71; *Thompson v. Gould*, 20 Pick. (Mass.) 139; *Anderson v. Armstead*, 69 Ill. 452.

(b) *Misrepresentation.*

One of the parties may have formed wrong conclusions regarding the subject-matter of the contract by statements innocently made or facts innocently withheld by the other party. This is called misrepresentation.

As distinguished from fraud it is a misstatement of material facts not known by the party making it to be false, or a concealment of material facts not intended to deceive. Misrepresentation not being a tort, the general rule in the United States is that it will not give rise to an action *ex delicto*, the action of deceit.¹¹

1. Innocent misrepresentation is a ground for avoiding a contract¹² when it consists in the making of the statement of a material fact which is believed to be true¹³ but is not, and upon which one of the parties has relied, without knowledge of its falsity, in making the contract.¹⁴

2. In contracts of a confidential¹⁵ or fiduciary¹⁶ nature, the failure to disclose a material fact¹⁷ by one who is under an obligation to disclose it,¹⁸ a fact which lies within his peculiar knowledge, is misrepresentation sufficient to set the contract aside.

(c) *Fraud.*

Fraud is a false representation of a material fact, made with a knowledge of its falsehood, or recklessly without belief in its truth,

¹¹ *Wakeman v. Dalley*, 51 N. Y. 27; *Tucker v. White*, 125 Mass. 344; *Cowley v. Smyth*, 46 N. J. L. 380.

¹² *Hammond v. Pennock*, 61 N. Y. 145; *Taylor v. Leith*, 26 Ohio St. 428; *Spurr v. Benedict*, 99 Mass. 463; *Wilcox v. Iowa Wesleyan University*, 32 Iowa 367.

¹³ *Smith v. Richards*, 13 Pet. (U. S.) 26; *Baughman v. Gould*, 45 Mich. 481; *Mulvey v. King*, 39 Ohio St. 491; *Allen v. Hart*, 72 Ill. 104.

¹⁴ *Fauntleroy v. Wilcox*, 80 Ill. 477; *Tuck v. Downing*, 76 Ill. 71.

¹⁵ *Baker v. Humphrey*, 101 U. S. 502; *Brooks v. Martin*, 2 Wal. 84; *Reed v. Peterson*, 91 Ill. 288.

¹⁶ *McLanahan v. Ins. Co.*, 1 Pet. (U. S.) 170, 185; *Chicago &c. R. R. Co. v. Thompson*, 19 Ill. 578, 589; *Lycoming Ins. Co. v. Rubin*, 79 Ill. 402, 403.

¹⁷ It is held here that the relation of the promoters to those who are induced by them to take stock is one of trust and confidence, and that stockholders may recover damages sustained through the failure of the promoters to disclose all material facts. *Brewster v. Hatch*, 122 N. Y. 349.

¹⁸ "Contracts of marine, fire and life insurance, contracts for the sale of land, for family settlements, and for the allotment of shares in companies, are of the special class affected by non-disclosure." Anson Contr. 192.

and with the intention that it shall serve to induce the other party to act upon it and that it shall be acted upon by him.

In order that fraud may be taken as a ground for avoiding a contract, it must be proved that it was committed by one of the parties with intent,¹⁹ and as a means of inducing the other party to enter into the contract; that the other party relied upon it²⁰ and that because of the fraudulent act he did enter into the contract.²¹ Fraud is distinguished from misrepresentation by the presence of dishonest intent, or by the withholding of facts which amounts to an intentional misrepresentation. This intent will be inferred if it is shown that the party had knowledge of the falsity of the representation, or if he made it of his own knowledge,²² while as a matter of fact, he knew nothing about the matter either way. In misrepresentation without dishonest intent, the contract may be avoided, but in fraud where this intent is present a tort action may be maintained.

1. It is not necessary that the fraudulent act be the only inducement²³ to enter into the contract. If there are present other inducements not fraudulent, the contract may still be avoided.

2. The false representation must be one of a material fact. If it is of an immaterial fact,²⁴ it will not be considered fraud from the legal point of view. Also it must be a misrepresentation of a matter of fact not of a matter of law,²⁵ nor of opinion²⁶ nor belief.²⁷

If the representation, although involving a matter of law, can be resolved into a representation of fact, it will be treated as a representation of fact

¹⁹ *Adams v. Soule*, 33 Vt. 538; *Witherwax v. Riddle*, 121 Ill. 140.

²⁰ *Mead v. Bunn*, 32 N. Y. 275; *David v. Park*, 103 Mass. 501; *Hicks v. Stevens*, 121 Ill. 186.

²¹ *Taylor v. Guest*, 58 N. Y. 262; *Ming v. Woolfolk*, 116 U. S. 599; *Hefner v. Vandolah*, 57 Ill. 520.

²² *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; *Cowley v. Smyth*, 46 N. J. L. 380; *Litchfield v. Hutchinson*, 117 Mass. 195; *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486.

²³ *Morgan v. Skiddy*, 62 N. Y. 319; *Safford v. Grout*, 120 Mass. 20; *Hicks v. Stevens*, 121 Ill. 186.

²⁴ *Geddes v. Pennington*, 5 Dow. 159.

²⁵ *Duffany v. Ferguson*, 66 N. Y. 482; *Fish v. Cleland*, 33 Ill. 237; *Upton v. Tribilcock*, 91 U. S. 50; *Ins. Co. v. Reed*, 33 Ohio St. 293; *Dillman v. Nadleffer*, 119 Ill. 567.

²⁶ *Gordon v. Butler*, 105 U. S. 553; *Cummings v. Cass*, 52 N. J. L. 77.

²⁷ *Chrysler v. Canaday*, 90 N. Y. 272; *Ellis v. Andrews*, 56 N. Y. 83; *Mooney v. Miller*, 102 Mass. 217; *Southern Development Co. v. Silver*, 125 U. S. 247.

instead of law. *Ross v. Drinkard's Admr.*, 35 Ala. 434; *Burns v. Lane*, 138 Mass. 350.

But the wilful misstatement of an opinion by an expert may constitute fraud. *Conlan v. Roemer*, 52 N. J. L. 53. To say that a building is fire-proof is to state a fact and not an opinion. *Hickey v. Morrell*, 102 N. Y. 454.

3. A false representation carelessly made²⁸ for the purpose of influencing another, without any knowledge as to its truth or falsity, will be considered as fraudulent.²⁹

4. The use of any trick to cover up the defects in goods sold, or actions which will mislead the purchaser, is deemed fraudulent.³⁰

5. The withholding of an essential part in the statement of a fact so that what is stated is misleading, is considered sufficient to avoid the contract.³¹

6. The purchase of goods with the accompanying promise to pay for them, is fraudulent if the promise was false at the time it was made.³² However, if the promise was made with honest intent the mere omission of the purchaser to state his insolvency does not make the act fraudulent.³³

(d) * Duress.

Duress is the actual or threatened violence toward or imprisonment of the contracting party, his wife, parent, or child; and it

²⁸ In this country the one to whom a telegraph message is addressed may generally maintain an action for damages for negligence, although he is not a party to the contract. "While it may be difficult to reply to the criticisms of the grounds upon which the American decisions rest, it must be regarded as settled by an almost unbroken current, that the telegraph company is under responsibility to the sendee, at least in those cases in which injury results from the delivery of an altered message." *Western Union Tel. Co. v. Allen*, 66 Miss. 549; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256; *New York & C. Co. v. Dryburg*, 35 Pa. St. 298.

²⁹ *Bennett v. Judson*, 21 N. Y. 238; *Cooper v. Schlesinger*, 111 U. S. 148; *Litchfield v. Hutchinson*, 117 Mass. 195; *Cabot v. Christie*, 42 Vt. 121.

³⁰ *Croyle v. Moses*, 90 Pa. St. 250; *Cogel v. Kniseley*, 89 Ill. 601.

³¹ *Kidney v. Stoddard*, 7 Met. (Mass.) 252; *Mallory v. Leach*, 35 Vt. 156, 168; *Hadley v. Clinton Imp. Co.*, 13 Ohio St. 502, 513.

³² *Hennequin v. Naylor*, 24 N. Y. 139; *Wright v. Brown*, 67 N. Y. 1; *Dow v. Sanborn*, 3 Allen 181; *Donaldson v. Farwell*, 93 U. S. 631; *Brown v. Montgomery*, 20 N. Y. 287; *Stewart v. Wyoming Rancho Co.*, 128 U. S. 383; *Maynard v. Maynard*, 49 Vt. 297; *Atwood v. Chapman*, 68 Me. 38.

³³ *Hotchkin v. Third Nat. Bank*, 127 N. Y. 329; *Morris v. Talcott*, 96 N. Y. 100; *Devoe v. Brandt*, 53 N. Y. 462; *Nichols v. Pinnee*, 18 N. Y. 295; *Morrill v. Blackman*, 42 Conn. 324, 329; *Talcott v. Henderson*, 31 Ohio St. 162.

must be inflicted by the other party to the contract, or by one acting with his knowledge and for his benefit.³⁴

Contract entered into under a threat³⁵ may be set aside on the ground of duress. The degree of the danger or impending injury must be sufficient to sway the will of the average person. The consent essential in contract is free consent, not in any way limited or forced by compulsion. Where there is compulsion there is no real consent.

1. Personal violence sufficient to force the ordinary person to act will amount to duress.³⁶

2. A destruction of property or its seizure and detention³⁷ in order to compel a party to contract will be sufficient duress to nullify the agreement.³⁸

3. An unlawful imprisonment of the other party, or one of his relatives,³⁹ in prison or elsewhere, or the abuse of a lawful process⁴⁰ to secure a contract constitutes duress.

(e) *Undue Influence.*

Undue influence sufficient to nullify a contract is found when a person misuses his power to secure an agreement through the mental weakness of the other party, or through his confidential relation with him.

1. The abuse of the influence arising from filiation⁴¹ or from the confidential relation⁴² existing between the parties will avoid the contract.

³⁴ *Adams v. Irving Nat. Bank*, 116 N. Y. 606; *Brown v. Pierce*, 7 Wall (U. S.) 205; *Morse v. Woodworth*, 155 Mass. 233; *Morrill v. Nightingale*, 93 Cal. 452.

³⁵ *Taylor v. Jaques*, 106 Mass. 291; *Foshay v. Ferguson*, 5 Hill 154.

³⁶ *Banc v. Detrick*, 52 Ill. 26; *Baker v. Morton*, 12 Wal. 150, 157.

³⁷ *Tolhurst v. Powers*, 133 N. Y. 460.

³⁸ *Bruecher v. Portchester*, 101 N. Y. 240; *McPherson v. Cox*, 86 N. Y. 472; *Scholey v. Mumford*, 60 N. Y. 498; *Harmony v. Bingham*, 12 N. Y. 99; *Chandler v. Sanger*, 114 Mass. 364; *Boston &c. Co. v. Boston*, 4 Met. 181.

³⁹ *Harris v. Carmody*, 131 Mass. 51; *Shenk v. Phelps*, 6 Ill. App. 612.

⁴⁰ *Schoener v. Lissauer*, 107 N. Y. 111; *Osborn v. Robbins*, 36 N. Y. 365; *Eadie v. Slimmon*, 26 N. Y. 9; *Watkins v. Baird*, 6 Mass. 506, 511.

⁴¹ *Bowe v. Bowe*, 42 Mich. 195; *Taylor v. Taylor*, 8 How. 183; *Brown v. Burbank*, 64 Cal. 99.

⁴² *Fisher v. Bishop*, 108 N. Y. 25; *Marx v. McGlynn*, 88 N. Y. 357; *Cowee v. Cornell*, 75 N. Y. 91; *Boyd v. De La Montagnie*, 73 N. Y. 498; *Pierce v. Pierce*, 71 N. Y. 154; *Sears v. Shafer*, 6 N. Y. 268, 272; *Woodbury v. Woodbury*, 141 Mass. 329; *Wickizer v. Cook*, 85 Ill. 68; *Jones v. Lloyd*, 117 Ill. 597; *Haydock v. Haydock*, 34 N. J. Eq. 570, 574.

2. If the mental incapacity⁴³ of another due to sickness, old age, or anxiety is abused to secure a contract, such agreement may be set aside. The mental incapacity must amount to inability to understand the meaning of the contract and its effect.

3. If the influence arising from supplying the needs of an expectant heir,⁴⁴ or expectant devisee⁴⁵ or legatee, is misused the contract may be nullified.

CASES.

SECTION VI.—REALITY OF CONSENT.

Mistake as to the identity of the person with whom the contract is made.

BOSTON ICE CO. v. POTTER.

123 MASSACHUSETTS, 28.—1877.

Contract on an account annexed, for ice sold and delivered between April 1, 1874, and April 1, 1875. Answer, a general denial. Judgment for defendant. Plaintiff alleged exceptions.

ENDICOTT, J. To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply, he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought out the business of the Citizens' Ice Company, until after the delivery and consumption of the ice.

The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

⁴³ *Rider v. Miller*, 86 N. Y. 507; *Rau v. Von Zedlitz*, 132 Mass. 164; *Griffith v. Godey*, 113 U. S. 89, 95; *Allore v. Jewell*, 94 U. S. 506, 511; *Moore v. Moore*, 56 Cal. 89; *Kimball v. Cuddy*, 117 Ill. 213, 218.

⁴⁴ *Bacon v. Bonham*, 33 N. J. Eq. 614; *Jenkins v. Pye*, 12 Pet. 257; *Boynton v. Hubbard*, 7 Mass. 112; *Parsons v. Ely*, 45 Ill. 232.

⁴⁵ *Parmelee v. Cameron*, 41 N. Y. 392; *Davidson v. Little*, 22 Pa. St. 245.

There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied assumpsit. *Hills v. Snell*, 104 Mass. 173, 177. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. *Orcutt v. Nelson*, 1 Gray, 536, 542; *Winchester v. Howard*, 97 Mass. 303; *Hardman v. Booth*, 1 H. & C. 803; *Humble v. Hunter*, 12 Q. B. 310; *Robson v. Drummond*, 2 B. & Ad. 303. If he had received notice and continued to take the ice as delivered, a contract would be implied. *Mudge v. Oliver*, 1 Allen, 74; *Orcutt v. Nelson*, *ubi supra*; *Mitchell v. Lapage*, Holt N. P. 253.

There are two English cases very similar to the case at bar. In *Schmaling v. Thomlinson* (6 Taunt. 147) a firm was employed by the defendants to transport goods to a foreign market, and transferred the entire employment to the plaintiff, who performed it without the privity of the defendants, and it was held that he could not recover compensation for his services from the defendants.

The case of *Boulton v. Jones* (2 H. & N. 564) was cited by both parties at the argument. There the defendant, who had been in the habit of dealing with one Brocklehurst, sent a written

order to him for goods. The plaintiff, who had on the same day bought out the business of Brocklehurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brocklehurst. And it was held that the plaintiff could not maintain an action for the price of the goods against the defendant. It is said in that case that the defendant had a right of set-off against Brocklehurst, with whom he had a running account, and that is alluded to in the opinion of Baron Bramwell, though the other judges do not mention it.

The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. If there is such a set-off, it is sufficient to state that as a reason why the defendant should prevail; but it by no means follows that because it does not exist the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defense to it.

The implied assumpsit arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party. At the same time, the fact that the right of set-off against the original contractor could not, under any circumstances, be availed of in an action brought upon the contract by the person to whom it was transferred and who executed it, shows that there is no privity between the parties in regard to the subject-matter of this action.

It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company.

We are not called upon to determine what other remedy the plaintiff has, or what would be the rights of the parties if the ice were now in existence.

Exceptions overruled.

Misrepresentation: Representations as distinguished from terms.

DAVISON *v.* VON LINGEN.

113 UNITED STATES, 40.—1884.

Libel *in personam*, in admiralty against the owners of the steamer *Whickham*, to recover damages for breach of charter-party. Cross-libel *in personam* against the charterers for damages for breach of charter-party.

The charter-party was executed at Philadelphia on August 1, 1879, and provided that the steamship *Whickham* "now sailed or about to sail from Benizaf with cargo for Philadelphia, . . . with liberty to take outward cargo to Philadelphia for owner's benefit, shall, with all convenient speed, sail and proceed to Philadelphia or Baltimore, at charterers' option, after discharge of inward cargo at Philadelphia, or as near thereunto as she may safely get, and there load afloat from said charterers, or their agents, a full and complete cargo of grain and (or) other lawful merchandise." The owners had submitted a charter-party in which the vessel was described as "sailed from, or loading at, Benizaf," but this the charterers declined to accept, and the charter-party was executed with the description "now sailed or about to sail from Benizaf." In fact the vessel was then loading at Benizaf, and did not sail until August 7th. On the 9th the charterers learned that she had that day passed Gibraltar, and being satisfied that she would not arrive in time to load in August, procured another vessel, which they loaded at an increased rate of freight, as favorable as possible. The *Whickham* discharged her cargo at Philadelphia on September 7th and was tendered to the charterers at Baltimore on the 11th. The charterers declined to accept her on the ground that she had neither sailed nor was about to sail from Benizaf on August 1st. Another charter was then obtained at a loss, on as favorable terms as possible, and for this loss the owners filed the cross-libel.

It further appeared that all parties understood that the charterers wanted a vessel which could load in August; that they had asked a guaranty that the *Whickham* would arrive in time, but this was refused; that the basis of the belief that the *Whickham*

would arrive rested on telegraphic information from Gibraltar, a day's sail from Benizaf.

Decree for cross-libellants in District Court, which was reversed in the Circuit Court and a decree entered for the libellants.

MR. JUSTICE BLATCHFORD. The decision of the Circuit Court proceeded on the ground that the language of the charter-party must be interpreted, if possible, as the parties in Baltimore understood it when they were contracting. In view of the facts, that all the contracting parties understood that the vessel was wanted to load in August, that, as soon as the charterers learned that she did not leave Gibraltar until the 9th, they took steps to get another vessel, and that they declined to sign a charter-party which described the vessel as "sailed from, or loading at, Benizaf," the court held that the language of the charter-party meant that the vessel had either sailed, or was about ready to sail, with cargo; and that the vessel was not in the condition she was represented, being not more than three-elevenths loaded.

The argument for the appellants is, that the words of the charter-party "about to sail with cargo" imply that the vessel has some cargo on board but is detained from sailing by not having all on board, and that she will sail, when, with dispatch, all her cargo, which is loading with dispatch, shall be on board; and that this vessel fulfilled those conditions. As to the attendant circumstances at Baltimore, it is urged that the charterers asked for a guaranty that the vessel would arrive in time for their purposes, and it was refused, and that the printed clause as to an option in the charterers to cancel was stricken out, and that then the charterers accepted the general words used.

The words of the charter-party are, "now sailed, or about to sail, from Benizaf, with cargo for Philadelphia." The word "loading" is not found in the contract. The sentence in question implies that the vessel is loaded, because the words "with cargo" apply not only to the words "about to sail," but to the word "sailed," and as, if the vessel had "sailed with cargo," she must have had her cargo on board, so, if it is agreed she is "about to sail with cargo," the meaning is, that she has her cargo on board, and is ready to sail. This construction is in harmony with all that occurred between the parties at the time, and with the conduct of the charterers afterwards. The charterers wanted a guaranty that, even if the vessel had already sailed, or whenever

she should sail, she would arrive in time for them to load her with grain in August. This was refused, and the charterers took the risk of her arriving in time, if she had sailed, or if, having her cargo then on board, she should, as the charter-party says, "with all convenient speed, sail and proceed to Philadelphia or Baltimore." Moreover, the charterers refused to sign a charter-party with the words "sailed from, or loading at, Benizaf," and both parties agreed on the words in the charter-party, which were the words of authority used by the agents in Philadelphia of the owners of the vessel. The erasing of the printed words, as to the option of cancelling, was in harmony with the refusal of the owners to guarantee the arrival by a certain day. So, also, when the charterers learned, on the 9th of August, that the vessel did not leave Gibraltar till that day, they proceeded to look for another vessel. It was then apparent that the vessel had not left Benizaf by the 1st of August, or with such reasonable dispatch thereafter, that she could have had her cargo on board, ready to sail on the 1st of August.

That the stipulation in the charter-party, that the vessel is "now sailed, or about to sail, from Benizaf, with cargo, for Philadelphia," is a warranty, or a condition precedent, is, we think, quite clear. It is a substantive part of the contract, and not a mere representation, and is not an independent agreement, serving only as a foundation for an action for compensation in damages. A breach of it by one party justifies a repudiation of the contract by the other party, if it has not been partially executed in his favor. The case falls within the class of which *Glaholm v. Hays* (2 Man. & Gr. 257), *Ollive v. Booker* (1 Exch. 416), *Oliver v. Fielden* (4 Exch. 135), *Gorrissen v. Perrin* (2 C. B. N. S. 681), *Croockewit v. Fletcher* (1 H. & N. 893), *Seeger v. Duthie* (8 C. B. N. S. 45), *Behn v. Burness* (3 B. & S. 751), *Corkling v. Massey* (L. R. 8 C. P. 395), and *Lowber v. Bangs* (2 Wall. 728) are examples; and not within the class illustrated by *Tarrabochia v. Hickie*, 1 H. & N. 183; *Dimech v. Corlett*, 12 Moore P. C. 199; and *Cliphsham v. Vertue*, 5 Q. B. 265. It is apparent, from the averments in the pleadings of the charterers, of facts which are established by the findings, that time and the situation of the vessel were material and essential parts of the contract. Construing the contract by the aid of, and in the light of, the circumstances existing at the time it was made, averred in the pleadings and found as facts, we have no difficulty in holding the stipulation in question to be a warranty. See Abbott on Shipping, 11th ed. by Shee, pp.

227, 228. But the instrument must be construed with reference to the intention of the parties when it was made, irrespective of any events afterwards occurring; and we place our decision on the ground that the stipulation was originally intended to be, and by its term imports, a condition precedent. The position of the vessel at Benizaf, on the 1st of August—the fact that, if she had not then sailed, she was laden with cargo, so that she could sail—these were the only data on which the charterers could make any calculation as to whether she could arrive so as to discharge and reload in August. They rejected her as loading; but if she was in such a situation, with cargo in her, that she could be said to be “about to sail,” because she was ready to sail, they took the risk as to the length of her voyage.

The decree of the Circuit Court is affirmed.⁴⁶

The effect of misrepresentation in contracts.

WILCOX v. IOWA WESLEYAN UNIVERSITY.

32 IOWA, 367.—1871.

Action to foreclose a mortgage executed by defendant college to secure a promissory note. Defense, accord and satisfaction of note and mortgage, in consideration of certain lands agreed by defendant to be given and by plaintiff to be taken as payment. Plaintiff sets up that he was induced to enter into such agreement by the false representations of defendant as to the location, character, and value of the land. Such representations are found to be in fact false, but also that the agent of the defendant made them in good faith, believing each piece of land to be as described.

A decree was entered by the trial court cancelling the note and mortgage and releasing defendant from all liability thereon. Plaintiff appeals.

MILLER, J. Is the plaintiff entitled to be relieved from his agreement compounding his claim against defendant, and, if so, to what extent?

⁴⁶ See also *Norrington v. Wright*, 115 U. S. 203; *Wells, Fargo & Co. v. Pacific Ins. Co.*, 44 Cal. 397; *Morrill v. Wallace*, 9 N. H. 113; *Wolcott v. Mount*, 36 N. J. L. 262.

The appellee cites *Holmes v. Clark* (10 Iowa, 423), which holds, that in order to sustain an action on the ground of false and fraudulent representations in the sale of land, it must be shown that the representations were false and fraudulent within the knowledge of the party making them; and he argues that appellant is, in view of the law, without remedy in this case. The rule laid down in that case is well established and universally followed in all actions *at law* for damages sustained by false and fraudulent representations in a sale (see cases cited by appellant in that case); but equity will grant relief on the ground of fraud, although the party representing a material fact made the assertion *without knowing* whether it was true or not. The consequences to the person who acted on the faith of the representations are the same whether he who made them knew them to be false or was ignorant whether they were true or not. And if the representations were made to influence the conduct of another party in a matter of business, and they did influence him to his prejudice, equity will interfere and grant him relief. Willard's Eq. Jur. 150; *Ainslie v. Medlycott*, 9 Ves. 21; *Harding v. Randall*, 15 Me. 332; *Smith v. Richards*, 13 Pet. 38; *Turnbull v. Gadsden*, 2 Strobb. (S. C.) Eq. 14; *McFerran v. Taylor*, 3 Cranch, 281.

And even if by mistake, and innocently, a party misrepresents a material fact, upon which another party is induced to act, it is as conclusive a ground of relief in equity as a wilful and false assertion. *Taylor v. Ashton*, 11 Mees. & Wels. 400; *Foster v. Charles*, 6 Bing. 396.

Now it is entirely clear, from the evidence, that the plaintiff was thus induced to act in this case. The lots were represented to be of particular situations and values, when they were in fact otherwise; and while the agent informed plaintiff that he had never seen the lots himself, and did not make the representations from his own knowledge, yet he did what was, substantially, the same thing, by stating what the donors said in respect to their situations and values, and that he (the agent) knew one of the donors, whom he represented to be a smart business man and a leading member of the church, whose statements could be relied upon. Through the representations and persuasions of the agent, the plaintiff generously donated or agreed to donate forty per centum of his claim to the university, and receive in payment of the balance real property at cash prices. This he was, in equity and conscience, entitled to receive. He selected the two lots before

mentioned upon the representations of the agent, relying entirely, as he had a right to do under the circumstances, thereon respecting the situation and value of the same. The lots were not as represented. They were represented by the agent to be worth, in the aggregate, the sum of \$1,000, whereas they were worth less than one-fifth that sum. Under these circumstances the plaintiff is clearly entitled to equitable relief from so unconscionable a bargain. Nor do we think, under all the circumstances of the case, that he has lost his right to relief by any delay or laches on his part. And as, by his agreement, he was to receive land at cash prices, to the extent of sixty per centum of his claim, which the university has failed to pay or convey to him, he will be entitled to recover the money instead of these lots, according to his contract entered into June 6, 1861, viz.: \$1,000 with six per centum interest from that date, upon reconveying the lots to the university or to whom it shall direct.

* * * * *

The judgment of the District Court is reversed, and the cause will be remanded for further proceedings not inconsistent with this opinion, or the appellant may, if he so elect, have final judgment in this court.

Reversed.⁴⁷

Fraud is a false representation.

LAIDLAW *v.* ORGAN.

2 WHEATON (U. S.), 178.—1817.

Petition or libel for the possession of one hundred and eleven hogsheads of tobacco, and for the sequestration of the same pending the final decision of the court. Answer by defendants disclaiming any interest in the tobacco, and bill of interpleader by Boorman and Johnson, who claimed the ownership of the same. Writ of sequestration was granted, and on the trial a verdict was

⁴⁷ Accord: *Doggett v. Emerson*, 3 Story (U. S. C. C.), 700; *Spurr v. Benedict*, 99 Mass. 463; *Hammond v. Pennock*, 61 N. Y. 145; *Taylor v. Leith*, 26 Ohio St. 428; *Lewis v. McLemore*, 10 Yerg. (Tenn.) 206. See also note to *Chatham Furnace Co. v. Moffatt*.

directed for the plaintiff, and final judgment entered for the possession of the tobacco, and for costs. Writ of error by defendants.

The bill of exceptions was in part as follows:

“And it appearing in evidence in the said cause, that on the night of the 18th of February, 1815, Messrs. Livingston, White, and Shepherd brought from the British fleet the news that a treaty of peace had been signed at Ghent, by the American and British Commissioners, contained in a letter from Lord Bathurst to the Lord Mayor of London, published in the British newspapers, and that Mr. White caused the same to be made public, in a handbill, on Sunday morning, 8 o'clock, the 19th of February, 1815, and that the brother of Mr. Shepherd, one of these gentlemen, and who was interested in one-third of the profits of the purchase set forth in said plaintiff's petition, had on Sunday morning, the 19th of February, 1815, communicated said news to the plaintiff; that the said plaintiff, on receiving said news, called on Francis Girault (with whom he had been bargaining for the tobacco mentioned in the petition, the evening previous), said Francis Girault being one of the said house of trade of Peter Laidlaw & Co., soon after sunrise on the morning of Sunday, the 19th of February, 1815, before he had heard said news. Said Girault asked if there was any news which was calculated to enhance the price or value of the article about to be purchased; and that the said purchase was then and there made, and the bill of parcels annexed to the plaintiff's petition, delivered to the plaintiff, between 8 and 9 o'clock in the morning of that day; and that, in consequence of said news, the value of said article had risen from 30 to 50 per cent. There being no evidence that the plaintiff had asserted or suggested anything to the said Girault, calculated to impose upon him with respect to said news, and to induce him to think or believe that it did not exist; and it appearing that the said Girault, when applied to, on the next day, Monday, the 20th of February, 1815, on behalf of the plaintiff, for an invoice of said tobacco, did not then object to the said sale, but promised to deliver the invoice to the said plaintiff, in the course of the forenoon of that day; the court charged the jury to find for the plaintiff. Wherefore, that justice, by due course of law, may be done in this case, the counsel of said defendants, for them, and on their behalf, prays the court that this bill of exceptions be filed, allowed, and certified as the law directs.

“(Signed) DOMINICK A. HALL, District Judge.

“NEW ORLEANS, this 3d day of May, 1815.”

MARSHALL, C. J. The question in this case is, whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? The court is of opinion, that he was not bound to communicate it. It would be difficult to circumscribe

the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties. But at the same time, each party must take care not to say or do anything tending to impose upon the other.

The court thinks that the absolute instruction of the judge was erroneous, and that the question, whether any imposition was practiced by the vendee upon the vendor, ought to have been submitted to the jury. For these reasons, the judgment must be reversed, and the cause remanded to the District Court of Louisiana, with directions to award a *venire facias de novo*.

Judgment reversed, and *venire de novo* awarded.⁴⁸

Fraudulent concealment.

THE CLANDEBOYE.

70 FEDERAL REP. (C. C. A.), 631.—1895.

This was a libel by Leo Lomm, master of the steamtug Dauntless, against the steamship Clandeboye, W. H. Strickland, master, claimant, to recover compensation for salvage service. The Circuit Court rendered a decree awarding salvage in the sum of \$10,000, from which the claimant has appealed.

⁴⁸ "That case (*Laidlaw v. Organ*) seems to us to go as far as moral principles will justify, even in cases of that description, depending on public intelligence, and further than the same court seemed willing to go in the case of *Etting v. Bank of United States*, 11 Wheat. 59."—Mellin, C. J., in *Lapish v. Wells*, 6 Me. 175, 189. It should be noticed that *Etting v. Bank of United States* was a case of fraud on a surety. See also the criticism in *Paddock v. Strobbridge*, 29 Vt. 470, and the explanation in *Stewart v. Wyoming Rancho Co.*, 128 U. S. 383.

In *Croyle v. Moses* (90 Pa. St. 250), an action of deceit, the court says: "The question presented by the points was substantially, if at the time of the sale the horse was known to the defendant to be 'a cribber or wind-sucker,' and this fact was artfully concealed by him to the injury of the plaintiff, whether it was such a concealment of a latent defect as would avoid the contract. The points submitted did not rest on the mere facts that the horse was hitched short and the reasons assigned therefor, but also on the additional facts that the defendant knew him to be a crib-biter, and resorted to this artifice to conceal it, and gave an untruthful reason to mislead and deceive the plaintiff. The complaint is not for a refusal or omission to answer, but for an evasive and artful answer. . . . If the

SEYMOUR, District Judge. The material facts of the case are as follows: The *Clandeboye*, a large and valuable British steamer, had become disabled by breakage of machinery, and had arrived off the Little Bahama Islands. Her mate had been sent by a ship's boat for assistance, and had on the 15th of May, 1894, arrived at Savannah. In pursuance of telegraphic instructions cabled to him by the owners, he had engaged the services of the *Morse* of New York, then, however, lying at the port of Philadelphia, which had agreed to proceed forthwith to the Little Bahamas, and tow the *Clandeboye* to Vera Cruz, her port of destination, for the sum of \$5,000. Leo Lomm, the libellant, part owner and master of the tug *Dauntless*, lying at the time at its home port of Brunswick, Ga., having learned from the Savannah papers of the arrival at that port of the mate of the *Clandeboye*, and of the condition and location of that vessel, on the 17th of May telegraphed, through his agents, to Savannah, and received a reply stating that the tug *Morse* of New York had been chartered to go to the assistance of the *Clandeboye*. The distance from New York—and that from Philadelphia is about the same—to Stranger's Cay, where the *Clandeboye* was lying, is more than 1,000 miles. From Brunswick the distance is about one-third as great. Captain Lomm's boat was lying idle. He concluded that he could beat the *Morse* in a race to the *Clandeboye*, and that, the master of the latter not

jury should believe, as the plaintiff testified, that he said to the defendant, 'If there is anything wrong with the horse, I do not want him at any price,' and that the defendant, with knowledge he was a crib-biter, answered the plaintiff artfully and evasively, with intent to deceive him, and did thereby deceive him to his injury, it was such a fraud on the plaintiff as would justify him in rescinding the contract.'" *Dean v. Morey*, 33 Ia. 120.

In *Stewart v. Wyoming Range Co.* (128 U. S. 383), the court says: "In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; *aliud est tacere, aliud celare*; a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

knowing of the employment of the *Morse*, he could obtain a profitable job of salvage. The telegram announcing the employment of the *Morse* by the *Clandeboye's* owners reached Brunswick at a little after 3 P. M. of the 17th. Shortly after dark of the same day the *Dauntless* started for the Bahamas. She arrived at Stranger's Cay before noon of the 19th. Her master had the interview, and made with the master of the *Clandeboye* the contract, which is a matter in litigation, immediately thereafter, and in a couple of hours the vessels left for Newport News, one in tow of the other. Between three and four days afterwards the *Morse* reached the spot where the *Clandeboye* had been lying at anchor, to find that she had gone. The conversation between the masters of the steamer and of the tug at Stranger's Cay contains the contract entered into between them and the words that led up to it. . . . The material facts in the testimony are that Captain Lomm told Captain Strickland of the arrival of his mate in Savannah, but did not tell him of the employment of the *Morse* for his relief.

The result of the enterprise of Captain Lomm will be disastrous to the owners of the *Clandeboye* if the decree of the District Court is allowed to stand. Captain Lomm declined to take the *Clandeboye* to Vera Cruz, the port to which her cargo was consigned, and did tow her to Newport News, where she was repaired. Fifteen hundred tons of her cargo had to be unloaded and then reloaded before she proceeded to Vera Cruz. Her owners were compelled to pay to the owners of the *Morse* the sum of \$1,900 for the services of that tug, and salvage compensation amounting to \$10,000—double what the *Morse* had agreed to charge for towing the *Clandeboye* to Vera Cruz—has been awarded to the *Dauntless*. But the master of the steamship, in charge of his vessel, and not in communication with his owners, was fully empowered to contract with the owners of the *Dauntless*. The contract made was binding, unless invalidated by the conduct of Captain Lomm in concealing the fact that the owners of the *Clandeboye* had engaged the services of the *Morse*. As is said by the judge in the court below:

“Whether or not the right of Captain Lomm to a salvage reward was forfeited by his silence on the subject of the employment of the *Morse*, in his conferences at the Little Bahama banks with Captain Strickland, is the question on which the case depends. There is no doubt that Captain Lomm ought to have given this information to Captain Strickland. The question is, whether his obligation to do so was so stringent as to constitute the omission a fraudulent piece of deception.”

While the right to salvage does not necessarily always arise out

of an actual contract, it does so in the case at bar. Services spontaneously rendered to vessels wrecked, or, under the conditions of an earlier period, set upon by pirates, or attacked by enemies, or captured and rescued, are recompensed with salvage money, whether the services were or were not requested. The present case, however, is one of a different character. The *Clandeboye*, at anchor off the Bahamas, though disabled, and in a position of contingent peril, was not wrecked. She had remained eleven days without injury where she then was, and was under the plenary control of her master, who was at full liberty to accept or refuse the services of the *Dauntless*.

The arrangement entered into between the two masters constituted a contract, and is subject to the principles which regulate the validity of contracts. If valid, the courts of admiralty are bound to enforce it; if not, to set it aside, in accordance with the general rules affecting all contracts. The law of contracts requires of the parties to them mutual good faith. Is there any principle of mercantile law by which that obligation to good faith which required Captain Lomm to inform Captain Strickland of the hiring of the *Morse* is relaxed, and is not of so stringent a force as to make the omission fraudulent? If there is, it must be sought in the analogies of the rule of *caveat emptor*. The doctrine of *caveat emptor* belongs, strictly speaking, to the law of sales, but its principles apply to other contracts. Nor is it a doctrine peculiar to the common law. It is in force in all mercantile communities, and has always been administered under the civil law. Pothier says, speaking of the contract of sale: "Good faith prohibits, not only falsehood, but all suppression of everything which he with whom we contract has an interest in knowing, touching the thing which makes the object of the contract;" but he adds, speaking of contracts where one party has not revealed all his information to the other: "The interest of commerce" does not permit "parties to be readily admitted to demand a dissolution of bargains which have been concluded; they must impute it to themselves in not being better informed." Poth. Cont. Sale, pt. 2, c. 2, §§ 234, 239. In the case of *Laidlaw v. Organ*, Chief Justice Marshall says: "The question in this case is whether the intelligence of extrinsic circumstances which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor. The court is of the opinion that he was not bound to communicate it.

It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties." *Laidlaw v. Organ*, 2 Wheat. 178. "Under the general doctrine of *caveat emptor*, the vendor is not ordinarily bound to disclose every defect of which he may be cognizant, although his silence may operate virtually to deceive the vendee." Story, Cont. § 516. The general rule, both of law and equity, in respect to concealments, is that mere silence with regard to a material fact which there is no obligation to divulge will not avoid a contract. Thus if A, knowing that there is a mine in the land of B, of which B is ignorant, should contract to purchase the land without divulging the fact, it would be a valid contract, although the land were sold at a price which it would be worth without the mine, because A is under no legal obligation, by the nature of the contract, to give any information thereof. *Fox v. Macreth*, 2 Brown, Ch. 400, 1 White & T. Lead. Cas. Eq. *172. "Without some such general rule the facilities of sale would be greatly impeded, and there would be no security to the vendor" or to the vendee. Story, Cont. § 517.

It will be noticed that the general rule of law is a requirement of good faith in mutual dealings, and that the doctrine of *caveat emptor* is an exception to such requirement, founded upon special reasons, viz. the necessities of commerce, and the impossibility of so limiting any other doctrine as to do justice. As Chief Justice Marshall says, "it would be difficult to circumscribe the contrary doctrine within proper limits." The necessities of commerce require that enterprise should be encouraged by allowing diligence at least its due reward, and not interfering with any proper and reasonably fair competition for intelligence. Any other course would set the active and the slothful upon an equality. "*Vigilantibus non dormientibus jura subveniunt.*"

Even more weighty is the second reason given in support of the doctrine. The law works with blunt tools. Fallible memories, prejudiced statements, intentional falsehood, the bias of self-interest, ignorance, and stupidity, are all concomitants of much of the testimony from which she has to make up her judgments. General rules, applicable to the majority of cases, but sometimes having an oppressive bearing upon particular ones, make up the principles upon which, of necessity, she founds her decisions, for the law must be workable. It must be comprehensible to men who live under its rule, and must not be so complex as to over-

burden the memory with minutiae. Further, were it open, in all cases of contracts, for a dissatisfied party to cry off, by saying that the other party had known better than he the value of the subject-matter, or the market price, or some other extrinsic circumstance, there would be no finality in human dealings, and the only limitation to the litigation that would ensue would be that imposed by the diminution of business caused by such want of finality and certainty.

But *caveat emptor* is but the exception, and not the rule. Its operation is to be diligently circumscribed within proper limits. The doctrine is not applied (1) to cases of active fraud, one variety of which consists in misrepresentation of facts, including what is often equivalent, partial statements; it is not applied (2) to cases in which trust is implied by reason either of the relations to one another of the parties, or the nature of the contract; nor (3) to cases in which, in the absence of laches in the party injured, the persons dealing with one other do not deal upon mutually equal terms, by reason of there being special knowledge in the possession of one party which is inaccessible to the other.

(1) The case of actual or implied misrepresentation needs no illustration.

(2) That of trust includes all the known fiduciary relations,—such as those of attorney and client, guardian and ward, agent and principal, and generally of all who stand in the relation of trustee and *cestui que trust*. It also includes dealings with regard to all matters which from their nature demand mutual confidence. One seeking insurance is bound to state all facts within his knowledge which would have an influence on the terms of the contract, but are unknown to the insurer. A vendor of goods is bound to point out any latent defect in them known to himself. A person selling negotiable paper warrants that he has no knowledge of any facts which prove it worthless. It is held that if one sells to another a check of a third party, knowing that other checks of the same party have been recently dishonored, without communicating the fact to the buyer, it is a fraudulent concealment. *Brown v. Montgomery*, 20 N. Y. 287.

(3) The case of information possessed by one party and absolutely unobtainable by the other, though of rarer occurrence, is one in which the enforcement of the rule of good faith is fully as imperative as it is in the two classes of cases first mentioned. It is perhaps not properly an exception to the doctrine of *caveat*

emplot but rather a case outside of its terms. The purchaser cannot look out for what he cannot have knowledge of. It is thus stated by Chancellor Kent in his Commentaries: "If there be an intentional concealment or suppression of material facts in the making of a contract in cases in which both parties have not equal access to the means of information, it will be deemed unfair dealing, and will vitiate and avoid the contract." 2 Kent, Comm. Lect. 39, *482. It is implied in Judge Marshall's opinion in *Laidlaw v. Organ*, already cited, in the sentence ending with the words, "where the means of intelligence are equally accessible to both parties." *Supra*. Under this exception, more logically than under that of special confidence, where it is generally placed in the text books, comes the obligation of one who has manufactured goods to reveal to a purchaser any latent defect in them known to himself, and the similar obligation of a vendor of real estate to inform a vendee of all incumbrances placed by himself upon the land. Where one party to a contract has information inaccessible to the other, neither of the reasons assigned for the principle of *caveat emplot* applies. The contract is not one which should be sustained to encourage mercantile competition and diligence; for, where knowledge cannot be obtained, competition is impossible and diligence useless, there can be no vigilance to be rewarded or sloth to be discouraged. Nor would much danger of unsettling the finality of business transactions or of opening bargains to the uncertainties of conflicting testimony about the equality of knowledge of the parties be likely to arise by reason of the invalidating of contracts for this cause.

The case at bar is the first of the kind that has come before a court of admiralty, but it is as striking a one as could be imagined or invented. It is one in which one party to the bargain has knowledge of a fact which, if known to the other, would have prevented the making of the contract. The ignorance of the fact on the part of the second party is one which cannot be made a subject of controversy, and this ignorance was known to the party suing upon the contract. To give him the benefit of it, to the injury of the claimants, would be, in our opinion, a startling violation of the fundamental principle of all law, that equity is equality. We think that the agreement between the masters of the two vessels, made in the case at bar, is infected with all three of the vices just stated, and is, therefore, not within the doctrine of

caveat emptor. It must, therefore, be declared void under the principle that requires good faith in mutual dealings.

1. Without placing as much stress upon the point as upon the other two, we yet think it may be fairly held that in telling a part, but not the whole, of the truth to Captain Strickland, Captain Lomm was guilty of that *suppressio veri* which the law calls fraud. By this concealment he induced the former to make a contract which was contrary to the wishes and intents of his owners, who had already made with another a more favorable bargain,—a contract that he would not have made had the facts been fully disclosed.

2. The relation of salvor and saved, while not one of the fiduciary relations generally referred to in the law books, and accurately defined, as well as classified, is yet a fiduciary one. This will be readily apparent when we remember that in a large number of cases of salvage, particularly the earlier ones, the salvor has actually been in possession of the property saved, holding it for the lien which maritime law gives, and liable as trustee to the owner after the receipt of salvage. Besides this reason, another is to be found in the special confidence resulting from the very nature of the services rendered. We think special confidence as much belongs to the relation between salvor and saved as to that between insurer and insured.

3. Were the other reasons of declaring the contract void absent, we should unhesitatingly do so on the third ground, viz. because the parties were not dealing on terms of equality. There was on the part of Captain Lomm an intentional suppression of a material fact, in relation to which he was informed, while Captain Strickland had not access to any means of obtaining information of it. Looking at the position of the two parties to the bargain from another point of view, there appears to have been a striking inequality between them. The master of the *Clandeboy* had, when the *Dauntless* arrived at Stranger's Cay, been for nearly four weeks in a disabled vessel. He had lain helpless at his anchorage for eleven days. His only assistant, who was a navigator (the mate of the vessel), was absent, and he was alone in authority over the *Clandeboy*. He was suffering from the pressure of anxiety, responsibility, and delay. The master of the *Dauntless*, aware of all the circumstances, intent solely upon gain, fresh from home, with a mind disengaged and at ease, had an unfair advantage over him. In the short period during which he considered and agreed to

accept the services proffered to him, Captain Strickland can hardly be supposed to have had the time or grasp of the facts that would have enabled him to have drawn all the inferences from the fact of his mate's opportunities in Savannah that have been imagined by counsel. During that hurried interview between the masters of the two vessels, it doubtless confusedly occurred to the master of the *Clandeboy*e that his mate was trying to do something for him, and that tugs would be at hand in a short time, prepared to tow him somewhere. Probably he thought of the nearest ports. His conversation shows that thoughts of this kind were in his mind. He was anxious to get away, and with the words "first come, first served," he made terms with Captain Lomm, whose tug had arrived first. But it would be unjust to suppose that he expected or had in his mind any thought of the possible existence of what was actually the fact, viz. a contract under which a powerful tug had been employed by his owners to tow him to the place to which he desired to be taken (*Vera Cruz*), and was already on the way to *Stranger's Cay*, near the *Little Bahamas*, where he was lying. We see no reason to doubt his statement that, if he had known of the employment of the *Morse*, he would not have employed the *Dauntless*. The parties were not dealing on equal terms, and their contract cannot be enforced.

While, however, the contract must be set aside, it does not necessarily follow that the libellant is entitled to no compensation. The question remains, of what, if anything, the *Dauntless* is entitled to for any net benefit actually received by the *Clandeboy*e from her services. It would be inequitable to allow the latter to refuse to pay for anything of use actually received by her. Nor do we wish to extend to a new case the exaction of penalties in civil actions. In the actual condition and position of the *Clandeboy*e when taken in tow by the *Dauntless* she needed two things,—repairs, and the opportunity of taking her cargo to *Vera Cruz*. If Captain Lomm had not interfered, she would have been towed to *Vera Cruz* by the *Morse* at an expense, including cost of taking her mate and three seamen from *Tybee*, of \$5,200. Upon arriving at *Vera Cruz*, she could have discharged herself of her cargo, but could not have been repaired, owing to the fact that there are no facilities there for docking vessels. It would therefore have been necessary to have taken her to some port possessed of such facilities. *New Orleans*, *Pensacola*, and *Newport News* have been suggested. The former places are nearer *Vera Cruz* than *Newport*

News, but the latter is understood to have very superior facilities of the kind needed. The *Dauntless* rendered a real service to the *Clandeboye* in towing her to Newport News, where she could be docked. After being repaired, it became possible for her to proceed to Vera Cruz under her own steam, but it seems probable from the testimony that, had she been towed to Vera Cruz in the first instance, she would have been compelled to take a tug in her journey to a dry dock. This expense she has been saved. In addition to this, she was saved by the *Dauntless* from the perils of a four days' longer stay at her anchorage. On the other hand, at Newport News she was put to the expense of unloading and reloading 1,500 tons of her cargo, which is stated by Captain Strickland to have been \$1,200. The captain also states that the time occupied was sixteen days, and estimates demurrage at £45 per day. From this demurrage there ought to be deducted the four days' time saved her by the *Dauntless* in taking her from Stranger's Cay before the arrival of the *Morse*. I suppose, too, that the demurrage is estimated at charter-party rates, and is excessive. I should be disposed to allow \$1,700 for it. The amount lost to the owners of the *Clandeboye* by their obligations to the owners of the *Morse* was \$1,900. The total on this side, as I estimate it, would be \$4,800, besides costs of steaming from Newport News to Vera Cruz. Against this is the saving of the \$5,200, which was to have been paid for the services of the *Morse*, the cost of taking the *Clandeboye* from Vera Cruz to a port with docking facilities, which would have been necessary had she been towed to Vera Cruz before being repaired, and the benefit to her of her earlier rescue from the perils of her position on the coast of the Little Bahamas. On the whole, the court allows \$1,000 as the net gain to the owners of the *Clandeboye* for the services of the *Dauntless*.

Decree modified, and rendered in favor of the libellant in the sum of \$1,000.

GOFF, Circuit Judge. I agree with the court that the agreement made by the masters of the *Clandeboye* and the *Dauntless* must, under the circumstances shown to have existed at the time it was entered into, be declared void, and that it cannot be enforced in a court of admiralty. I do not concur in that part of the opinion that allows the libellant compensation for the services rendered by the *Dauntless*, undertaken, as they were, in bad faith,

with a fraudulent purpose, and the intention of suppressing the truth, thereby taking advantage of a vessel, if not in danger, at least in distress, and causing its owners an additional and unnecessary expense. In a case of this character a court of admiralty is a court of equity, and a party who asks its aid must come before it with clean hands, and with such facts as will, *ex æquo et bono*, show a case proper for its interposition. If the salvors have been guilty of misconduct or of negligence, or have been in collusion with the master, or have attempted to take advantage of the unfortunate, they have thereby forfeited all claim for compensation even for services actually rendered. *The Boston*, 1 Sumn. 328, Fed. Cas. No. 1673; *The Byron*, 5 Adm. Rec. 248, Fed. Cas. No. 2275; *The Lady Worsley*, 2 Spinks, 253; *The Bello Corrunes*, 6 Wheat. 152; Marvin, Wreck & Salv. § 222; Jones, Salv. 124; Cohen, Adm. Law, 171.

The undisputed facts of this case show it to be at least most peculiar, the books containing nothing similar to it, and in my judgment the courts should not aid in duplicating it by tolerating such litigation. I think that the decree of the District Court should be reversed, and the cause remanded, with directions that the libel be dismissed, and that the claimant recover all costs.

Fraud is a representation of fact.

DAWE *v.* MORRIS.

149 MASSACHUSETTS, 188.—1889.

Tort. Defendant demurred. The Superior Court sustained the demurrer, and plaintiff appeals.

DEVENS, J. The alleged misrepresentations of the defendant, by which the plaintiff avers that he was induced to enter into a contract for building thirty miles of the Florida Midland Railway, are that the defendant had purchased a certain quantity of rails at a certain price, and that he would sell those rails to the plaintiff at the same price if he would make such contract. The plaintiff's declaration alleges that the defendant had not then purchased the rails, and did not sell, and did not intend to sell,

any rails so purchased to the plaintiff; and that by reason of the contract into which the plaintiff was induced to enter, he was obliged to purchase a large number of rails at a much higher price than that named by the defendant, to his great injury. If the formalities required by law in order that contracts for the sale and delivery of goods of the value here in question had been complied with, that these facts would constitute a contract upon a valuable consideration, will not be questioned. The plaintiff does not seek to recover upon this contract, but in an action of tort in the nature of deceit, because he was induced to enter into the contract with the Florida Railway Company by reason of the representations above set forth.

A representation, in order that, if material and false, it may form the ground of an action where one has been induced to act by reason thereof, should be one of some existing fact. A statement promissory in its character that one will thereafter sell goods at a particular price or time, will pay money, or do any similar thing, or any assurance as to what shall thereafter be done, or as to any further event, is not properly a representation, but a contract, for the violation of which a remedy is to be sought by action thereon. The statement by the defendant that he would thereafter sell rails at a particular price if the plaintiff would contract with the railway company was a promise, the breach of which has occasioned the injury to the plaintiff. *Knowlton v. Keenan*, 146 Mass. 86.

The plaintiff contends that, even if this is so, the representation that the defendant had thus purchased the rails at the price named was material and false; but if the allegation that the defendant had purchased the rails be separated from that of the promise to sell them to the plaintiff, it is seen at once to be quite unimportant and immaterial. Had the defendant actually sold, or had he been ready to sell, the rails at the time and price he promised that he would, no action could have been maintained by reason of any false representation that he had purchased them when he made his promise, and no possible injury could thereby have resulted to the plaintiff.

It is urged that, independent of any promise to sell to him, if the plaintiff had believed that the defendant had purchased rails at the price at which he said he had purchased them, the plaintiff might thus have been induced to believe that he himself could thereafter purchase them at the same price.¹ But the injury from a false representation must be direct, and the probability or possi-

bility that, because the defendant had purchased at a particular price, the plaintiff would be able, or might believe himself to be able, to do so also, is too remote to afford any ground for action.

It must be shown, not only that the defendant has committed a tort and that the plaintiff has sustained damage, but that the damage is the clear and necessary consequence of the tort, and such as can be clearly defined and ascertained. *Lamb v. Stone*, 11 Pick. 527; *Bradley v. Fuller*, 118 Mass. 239. Quite a different case would be presented if the defendant had falsely represented to the plaintiff, if unskilled in the price of rails, what their market value then was, and what was the price at which they could then be purchased.

It is also said, that if the plaintiff believed that the defendant had actually purchased the rails, at the time of the transaction, and that if he knew that the completion of the railroad was of vital importance to the interests of the defendant, he would more readily have confided in the defendant's promise to sell them, and thus that this representation was material. But in order that a false representation may form the foundation of an action of deceit, it must be as to some subject material to the contract itself. If it merely affect the probability that it will be kept, it is collateral to it. "Representations as to matters which are merely collateral, and do not constitute essential elements of the contract into which the plaintiff is induced to enter, are not sufficient." *Hedden v. Griffin*, 136 Mass. 229.

Whether the allegation as to the purchase of the rails by the defendant was material was a question for the court, which was to construe the contract, and determine its legal effect on the duties and liabilities of the parties. It was for it to determine (there being on the declaration of the plaintiff no dispute as to the facts) whether the alleged misrepresentations were material, and such as would invalidate the contract or form the foundation of an action of tort. *Penn Ins. Co. v. Crane*, 134 Mass. 56.

The plaintiff further contends that, as when goods have been obtained under the form of a purchase with the intent not to pay for them, the seller may, on discovery of this, rescind the contract and repossess himself of the goods as against the purchaser or any one obtaining the goods from him with notice or without consideration, an action of tort should be maintained on an unfulfilled promise which, at the time of making, the promisor intended not to perform, by reason of which non-performance the

plaintiff has suffered injury in having been induced to enter into a contract which depended for its successful and profitable performance upon the performance by the defendant of his promise.

Assuming that the plaintiff's declaration enables him to raise this question,—which may be doubted, as the averment that "said defendant had not then purchased said rails, or any part of them, which the defendant then knew, and therefore did not sell, and did not intend to sell, said rails already purchased by them to the plaintiff," is not an averment that the defendant intended not to perform his contract,—there is an obvious difference between the case where a contract is rescinded, and thus ceases to exist, and one in which the injury results from the non-performance of that which it is the duty of the defendant to perform, and where there is no other wrong than such non-performance. To term this a tort would be to confound a cause of action in contract with one in tort, and would violate the policy of the statute of frauds by relieving a party from the necessity of observing those statutory formalities which are necessary to the validity of certain executory contracts.

It was not disputed that the plaintiff's declaration sets forth in the second count a good cause of action. The result is, that as to the first count the entry must be,

Judgment for the defendant affirmed.

Fraud is a representation of fact made with knowledge of its falsehood or without belief in its truth.

CHATHAM FURNACE CO. *v.* MOFFATT.

147 MASSACHUSETTS, 403.—1888.

Tort for false and fraudulent representations made by the defendant, whereby the plaintiff was induced to take a lease of a mine, and to purchase certain mining machinery. Judgment for plaintiff.

C. ALLEN, J. It is well settled in this commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a mat-

ter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge. This rule has been steadily adhered to in this commonwealth, and rests alike on sound policy and on sound legal principles. *Cole v. Cassidy*, 138 Mass. 437; *Savage v. Stevens*, 126 Mass. 207; *Tucker v. White*, 125 Mass. 344; *Litchfield v. Hutchinson*, 117 Mass. 195; *Milliken v. Thorndike*, 103 Mass. 382; *Fisher v. Mellen*, 103 Mass. 503; *Stone v. Denny*, 4 Met. 151; *Page v. Bent*, 2 Met. 371; *Hazard v. Irwin*, 18 Pick. 95. And though this doctrine has not always been fully maintained elsewhere, it is supported by the following authorities, amongst others: *Cooper v. Schlesinger*, 111 U. S. 148; *Bower v. Fenn*, 90 Penn. St. 359; *Brownlie v. Campbell*, 5 App. Cas. 925, 953, by Lord Blackburn; *Reese River Mining Co. v. Smith*, L. R. 4 H. L. 64, 79, 80, by Lord Cairns; *Slim v. Croucher*, 1 De G., F. & J. 518, by Lord Campbell. See also *Peek v. Derry*, 59 L. T. (N. S.) 78, which has been published since this decision was announced.

In the present case, the defendant held a lease of land, in which there was iron ore. The mine had formerly been worked, but operations had ceased, and the mine had become filled with water and debris. The defendant sought to sell this lease to the plaintiff, and represented to the plaintiff, as of his own knowledge, that there was a large quantity of iron ore, from 8,000 to 10,000 tons, in his ore bed, uncovered and ready to be taken out, and visible when the bed was free from water and debris. The material point was, whether this mass of iron ore, which did in truth exist under the ground, was within the boundaries of the land included in the defendant's lease, and the material part of the defendant's statement was, that this was in his ore bed; and the representations were not in fact true in this, that while in a mine connecting with the defendant's shafts there was ore sufficient in quantity and location relative to drifts to satisfy his representations, if it had been in the land covered by the defendant's lease, that ore was not in the defendant's mine, but was in the adjoining mine; and the defendant's mine was in fact worked out.

During the negotiations, the defendant exhibited to the plaintiff a plan of a survey of the mine, which had been made for him, and the plaintiff took a copy of it. In making this plan, the surveyor, with the defendant's knowledge and assent, did not take the course of the first line leading from the shaft through which the mine was entered, but assumed it to be due north; and the defendant never took any means to verify the course of this line. In point of fact, this line did not run due north, but ran to the west of north. If it had run due north, the survey, which was in other respects correct, would have correctly shown the mass of iron ore in question to have been within the boundaries of the land covered by the defendant's lease; but in consequence of this erroneous assumption the survey was misleading, the iron ore being in fact outside of those boundaries. It thus appears that the defendant knew that what purported to be a survey was not in all respects an actual survey, and that the line upon which all the others depended had not been verified, but was merely assumed; and this was not disclosed to the plaintiff. The defendant took it upon himself to assert, upon his own knowledge, that this large mass of ore was in his ore bed, that is, within his boundaries; and in support of this assertion he exhibited the plan of the survey, the first line of which had not been verified, and was erroneous. Now this statement was clearly of a thing which was susceptible of knowledge. A real survey, all the lines of which had been properly verified, would have shown with accuracy where the ore was situated. It was within the defendant's knowledge that the first line of the plan had not been verified. If under such circumstances he chose to take it upon himself to say that he knew that the mass of ore which had been discovered was in his ore bed, in reliance upon a plan which he knew was not fully verified, it might properly be found that the charge of fraudulent misrepresentation was sustained, although he believed his statement to be true.

The case of *Milliken v. Thorndike* (103 Mass. 382) bears a considerable resemblance to the present in its facts. That was an action by a lessor to recover rent of a store, which proved unsafe, certain of the walls having settled or fallen in shortly after the execution of the lease. The lessor exhibited plans, and, in reply to a question if the drains were where they were to be according to the plans, said that the store was built according to the plans in every particular; but this appeared by the verdict of the jury

to be erroneous. The court said, by Mr. Justice Colt, that the representation "was of a fact, the existence of which was not open and visible, of which the plaintiff (the lessor) had superior means of knowledge, and the language in which it was made contained no words of qualification or doubt. The evidence fully warranted the verdict of the jury."

In respect to the rule of damages, the defendant does not in argument contend that the general rule adopted by the judge was incorrect, but that it does not sufficiently appear what considerations entered into his estimate. No requests for rulings upon this subject were made, and there was no error in the course pursued by the judge.

Exceptions overruled.⁴⁹

Duress.

MORSE v. WOODWORTH.

155 MASSACHUSETTS, 233.—1892.

Action of contract to recover the amount of three promissory notes given by defendant to plaintiff, and delivered up to defendant by plaintiff and mutual releases executed under threats of prosecution and arrest on a criminal charge of embezzling defendant's money.

The court charged the jury in substance that to constitute duress by threats of imprisonment the threats must be such as actually

⁴⁹ Accord: *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486; *Dulaney v. Rogers*, 64 Mo. 201; *Haven v. Neal*, 43 Minn. 315.

That a defendant is not liable in an action for deceit where the misrepresentation was made innocently, see *Cowley v. Smyth*, 46 N. J. L. 380; *Da Lee v. Blackburn*, 11 Kans. 150; *Tucker v. White*, 125 Mass. 344; *Wakeman v. Dalley*, 51 N. Y. 27. Contra: *Holcomb v. Noble*, 69 Mich. 396; *Davis v. Nuzum*, 72 Wis. 439, in which States no such distinction is taken.

If an independent action of deceit could not be maintained, it would seem that a claim for damages for deceit could not be interposed as a defense to an action for the price. *McIntyre v. Buell*, 132 N. Y. 192; *King v. Eagle Mills*, 10 Allen, 548; *First N. B. v. Yocum*, 11 Neb. 328. Contra: *Mulvey v. King*, 39 Ohio St. 491; *Loper v. Robinson*, 54 Tex. 510.

But it would be a defense to an action for damages for breach of a bilateral contract. *School Directors v. Boomhour*, 83 Ill. 17.

overcame the will of the plaintiff, and that in testing the question the jury might consider whether they were such as would overcome the will of a man of ordinary firmness; and refused to charge, at the request of defendant, that if the defendant believed plaintiff had wrongfully taken money belonging to defendant, and no civil or criminal proceeding had been begun, then mere threats of prosecution or arrest would not constitute duress, that mere threats of criminal prosecution or arrest, when no warrant has been issued or proceedings commenced, do not constitute duress. The court referred to the ambiguity in the word "mere," and reiterated its former charge. Defendant excepted. Verdict for plaintiff.

KNOWLTON, J. The only remaining exceptions relate to the requests of the defendant and the rulings of the court in regard to duress. The plaintiff contended that he gave up the notes and signed the release under duress by threats of imprisonment. The question of law involved is whether one who believes and has reason to believe that another has committed a crime, and who, by threats of prosecution and imprisonment for the crime, overcomes the will of the other, and induces him to execute a contract which he would not have made voluntarily, can enforce the contract if the other attempts to avoid it on the ground of duress.

Duress at the common law is of two kinds, duress by imprisonment and duress by threats. Some of the definitions of duress *per minas* are not broad enough to include constraint by threats of imprisonment. But it is well settled that threats of unlawful imprisonment may be made the means of duress, as well as threats of grievous bodily harm. The rule as to duress *per minas* has now a broader application than formerly. It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties meeting in agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will and compel a formal assent to an undertaking when he does not really agree to it, and so to make that appear to be his act which is not his but another's, imposed on him through fear which deprives him of self-control, there is no contract unless the other deals with him in good faith, in ignorance of the improper influence, and in the belief that he is acting voluntarily.

To set aside a contract for duress it must be shown, first, that

the will of one of the parties was overcome, and that he was thus subjected to the power of another, and that the means used to induce him to act were of such a kind as would overcome the mind and will of an ordinary person. It has often been held that threats of civil suits and of ordinary proceedings against property are not enough, because ordinary persons do not cease to act voluntarily on account of such threats. But threats of imprisonment may be so violent and forceful as to have that effect. It must also be shown that the other party to the contract is not, through ignorance of the duress or for any other reason, in a position which entitles him to take advantage of a contract made under constraint without voluntary assent to it. If he knows that means have been used to overcome the will of him with whom he is dealing, so that he is to obtain a formal agreement which is not a real agreement, it is against equity and good conscience for him to become a party to the contract, and it is unlawful for him to attempt to gain a benefit from such an influence improperly exerted.

A contract obtained by duress of unlawful imprisonment is voidable. And if the imprisonment is under legal process in regular form, it is nevertheless unlawful as against one who procured it improperly for the purpose of obtaining the execution of a contract; and a contract obtained by means of it is voidable for duress. So it has been said that imprisonment under a legal process issued for a just cause is duress that will avoid a contract if such imprisonment is unlawfully used to obtain the contract. *Richardson v. Duncan*, 3 N. H. 508. See also *Foshay v. Ferguson*, 5 Hill (N. Y.), 154; *United States v. Huckabee*, 16 Wall. 414, 431; *Miller v. Miller*, 68 Penn. St. 486; *Walbridge v. Arnold*, 21 Conn. 424; *Wood v. Graves*, 144 Mass. 365, and cases cited.

It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is, whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome

the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts, without reference to the influences which moved them. In such a case, there is no reason why one should be bound by a contract obtained by force, which in reality is not his, but another's.

We are aware that there are cases which tend to support the contention of the defendant. *Harmon v. Harmon*, 61 Maine, 227; *Bodine v. Morgan*, 10 Stew. 426, 428; *Landa v. Obert*, 45 Texas, 539; *Knapp v. Hyde*, 60 Barb. 80. But we are of opinion that the view of the subject heretofore taken by this court, which we have followed in this opinion, rests on sound principles, and is in conformity with most of the recent decisions in such cases, both in England and America. *Hackett v. King*, 6 Allen, 58; *Taylor v. Jaques*, 106 Mass. 291; *Harris v. Carmody*, 131 Mass. 51; *Bryant v. Peck & Whipple Co.*, 154 Mass. 460; *Williams v. Bayley*, L. R. 1 H. L. 200; *S. C.*, 4 Giff. 638, 663, note; *Eadie v. Slimmon*, 26 N.Y. 9; *Adams v. Irving National Bank*, 116 N. Y. 606; *Foley v. Greene*, 14 R. I. 618; *Sharon v. Gager*, 46 Conn. 189; *Bane v. Detrick*, 52 Ill. 19; *Fay v. Oatley*, 6 Wis. 42.

We do not intimate that a note given in consideration of money embezzled from the payee can be avoided on the ground of duress, merely because the fear of arrest and imprisonment, if he failed to pay, was one of the inducements to the embezzler to make the note. But if the fact that he is liable to arrest and imprisonment is used as a threat to overcome his will and compel a settlement which he would not have made voluntarily, the case is different. The question in every such case is, whether his liability to imprisonment was used against him, by way of a threat, to force a settlement. If so, the use was improper and unlawful, and if the threats were such as would naturally overcome the mind and will of an ordinary man, and if they overcame his, he may avoid the settlement. The rulings and refusals to rule were correct.

Exceptions overruled.

ENGINEERING CASES: EXCERPTS FROM DECISIONS.

MISREPRESENTATION.

Mere expression of honest opinion will not, as a rule, be regarded as fraud, either as a basis of an action of deceit or as a ground for setting aside a contract, although the opinion may prove to be erroneous. 141 N. Y. 596. This rule applies ordinarily to statements of the value of property to be bought or sold. 90 N. Y. 272.

FRAUD.

An engineer's estimate which made the rock excavation twice the actual amount, and the earth excavation less than one-half the actual amount, was held not an estimate upon which to base a valid contract; that such an estimate taken with a bid specifying cost of earth excavation over five times its actual cost, and rock excavation less than one and one-half per cent of its actual cost, raised an inference of fraud. *In re Anderson* (N. Y.), 17 N. E. Rep. 209.

Where two persons about to file bids agreed to become partners in carrying out the contract in case either secured it, both to share the profits equally, the agreement was held not to be against public policy and that it did not appear that the tendency of the contract was to stifle competition. *Breslin v. Brown*, 24 Ohio St. 565.

DURESS.

A contractor working under a parol contract had commenced grading one mile of roadbed. The laborers becoming dissatisfied, the owner said to them: "I will stand good for no more work you do for contractor." As a result the contractor was obliged to sign a contract for half a mile of roadbed. The contractor was unable to pay. Held that the contract was not signed under duress. *McCormick v. Dalton* (Kans.), 35 Pac. Rep. 1113.

Where a person has been refused the payment of the balance due after completing his contract, unless he repair, labor free, certain damages done to the work done by a stranger, he cannot recover

the cost of such extra labor, as he was not under duress. 133 N. Y. 372.

Excessive charges paid to railroad companies refusing to carry or deliver goods, unless these payments were made voluntarily, have been recovered on the ground of duress. 27 L. J. Ch. 137; 30 L. J. Exch. 361.

Where the carrier refuses to transport stock until a certain special contract is signed limiting its liability, it does not bind the shipper. 48 Kans. 210.

SECTION VII.

LEGALITY.

The object of the parties in forming an agreement will now be considered. The courts have limited the freedom of contract to the extent that some objects are forbidden while others are discouraged, and even though all other requirements for the formation of a valid contract be present, yet if the parties have these objects in mind at the time of entering into the agreement, the law will not enforce it.

This subject is divided into two parts: the nature of the objects considered illegal, and the effect of the presence of such objects in a contract.

(a) *Nature of Illegality.*

1. A contract to perform an act forbidden by law¹ cannot be enforced. An agreement to commit a crime;² or to do a civil wrong³ would come under this rule.

2. A contract which is against the policy of the law,⁴ or public policy, may be set aside. Agreements which come within the scope of this rule are those which tend to increase litigation;⁵ con-

¹ *Wheeler v. Russell*, 17 Mass. 258, 281; *Byrd v. Hughes*, 84 Ill. 174.

² *Collins v. Blanton*, 2 Wils. 347, 350; *Henderson v. Palmer*, 71 Ill. 579, 583.

³ *Materne v. Horwitz*, 101 N. Y. 469; *Hatch v. Mann*, 15 Wend. (N. Y.) 45, 46; *Clay v. Yates*, 1 H. & N. 73; *Merrill v. Packer*, 80 Iowa 542.

⁴ *Bliss v. Lawrence*, 58 N. Y. 442; *Holcomb v. Weaver*, 136 Mass. 265; *Rice v. Wood*, 113 Mass. 133; *Oscanyan v. Arms Co.*, 103 U. S. 261, 267-8; *Cothran v. Ellis*, 125 Ill. 496.

⁵ *Fowler v. Callan*, 102 N. Y. 395; *Phillips v. South Park Comrs.*, 119 Ill. 626; *Norton v. Tuttle*, 60 Ill. 130, 134; *Dayton v. Fargo*, 45 Mich. 153.

tracts with alien enemies;⁶ those in restraint of trade;⁷ those which interfere with the course of public justice;⁸ those which tend to the injury of public service;⁹ those which are contrary to morality;¹⁰ those which affect the freedom of marriage,¹¹ and those intended to stifle competition at sales by auction.¹²

3. Gaming contracts are void by the statutes of most states.¹³

4. Negotiable instruments given in payment of wagers, if not declared void by statute, follow the general rule as to illegal consideration and are valid in the hands of *bona fide* holders for value.¹⁴

(b) Effect of Illegality.

1. If a contract may be divided into several promises based on several considerations, the illegality of one or more of these considerations will not nullify all the promises.¹⁵

⁶ *Woods v. Wilder*, 43 N. Y. 164; *United States v. Grossmayer*, 9 Wall (U. S.) 72; *Kershaw v. Kelsey*, 100 Mass. 561.

⁷ *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Arnot v. Coal Co.*, 68 N. Y. 558, 565; *Gamewell Fire Alarm Co. v. Crane*, 160 Mass. 50; *Bishop v. Palmer*, 146 Mass. 469, 474; *Morris etc. Co. v. Coal Co.*, 68 Pa. St. 173, 184.

⁸ *Gorham v. Keyes*, 137 Mass. 583; *Partridge v. Hood*, 120 Mass. 403; *McMahon v. Smith*, 47 Conn. 221; *Shenk v. Phelps*, 6 Ill. App. 612, 620; *Schommer v. Farwell*, 56 Ill. 542, 544.

⁹ *Mills v. Mills*, 40 N. Y. 543; *Devlin v. Brady*, 36 N. Y. 531; *Gray v. Hook*, 4 N. Y. 449; *Meguire v. Corwine*, 101 U. S. 108; *Trist v. Child*, 21 Wall (N. Y.) 441; *Frost v. Belmont*, 6 Allen (Mass.) 152.

¹⁰ *Ernest v. Crosby*, 140 N. Y. 364; *Wallace v. Rappleye*, 103 Ill. 229, 249; *Hanks v. Naglee*, 54 Cal. 51; *Boigneres v. Boulon*, 54 Cal. 146; *Brown v. Tuttle*, 80 Me. 162.

¹¹ *Pettit v. Brown*, 107 N. Y. 677; *Duval v. Wellman*, 124 N. Y. 156; *Hartley v. Rice*, 10 East 22; *Sterling v. Sinnickson*, 2 South (N. J.) 756; *Chalfant v. Payton*, 91 Ind. 202.

¹² *Atcheson v. Mallon*, 43 N. Y. 147; *Gibbs v. Smith*, 115 Mass. 592; *Ray v. Mackin*, 100 Ill. 246.

¹³ Stimson, Am. St. Law § 4132. Most states have constitutional prohibitions against legalizing lotteries. Ibid. § 426. In New York the legislature is forbidden to legalize any kind of gambling. Const., Art. 1 § 9 (1895).

¹⁴ The holder has the burden of showing that he took without notice and for a valuable consideration. *Vosburg v. Diefendorf*, 119 N. Y. 357.

¹⁵ If there are two promises, one legal and the other illegal, resting upon one legal consideration, the promisee may waive the illegal promise and enforce the legal one. *Erie Railway Co. v. Union Loc. & Exp. Co.*, 35 N. J. L. 240; *United States v. Bradley*, 10 Pet. (U. S.) 343, 360-64; *Dean v. Emerson*, 102 Mass. 480.

2. If a contract contains one legal promise resting upon two considerations, one of which is legal and the other illegal, the promisee cannot enforce the promise, for he cannot legally perform the consideration.¹⁶

3. The courts may deal with an illegal contract in one of three ways:

- (a) Impose a penalty without setting the contract aside;
- (b) Avoid the contract;
- (c) Prohibit the making of the agreement.

4. If one of the parties has no knowledge of the illegal object throughout the transaction, he may recover what may be due him.¹⁷ In order that he may not recover, it must be proved that he had intent to participate in the act, as well as the knowledge that it was contemplated.¹⁸

CASES.

SECTION VII.—LEGALITY.

Contracts made in breach of statute: Wagers.

LOVE *v.* HARVEY.

114 MASSACHUSETTS, 80.—1873.

Contract. The plaintiff and the defendant made a bet as to the place of burial in Holyhood Cemetery of the body of one Dr. Cahill, the plaintiff betting that it was buried on the left-hand side of the main avenue, and the defendant betting that it was buried on the right-hand side of that avenue. The money was deposited, twenty dollars by each party, in the hands of one James Stack as stakeholder. It was determined that the body was buried on the left-hand side of the avenue, yet the stakeholder delivered to the defendant the plaintiff's twenty dollars, and the defendant, though requested, refused to repay the same to the plaintiff. The declaration contained another count for money had and received by the defendant to the plaintiff's use. The answer was a general denial.

¹⁶ *Bixby v. Moore*, 51 N. H. 402; *Bishop v. Palmer*, 146 Mass. 469; *Handy v. St. Paul Globe Co.*, 41 Minn. 188.

¹⁷ *Emery v. Kempton*, 2 Gray (Mass.) 257.

¹⁸ *Tyler v. Carlisle*, 79 Me. 210.

The presiding judge ruled and instructed the jury that courts did not sit to decide wagers; that it did not matter whether the plaintiff was right or not, regarding the situation of the burial-place in question, or whether the defendant received from the stakeholder the same money that was deposited with him by the plaintiff, if the money was paid and received as money of the plaintiff; that if, before the money was paid over to the defendant, the plaintiff forbade payment thereof in the defendant's presence, then the defendant received it without consideration and wrongfully, and was liable in the action for money had and received.

GRAY, C. J. In England and in New York, actions on wagers upon questions in which the parties had no previous interest were frequently sustained, until the legislature interposed and declared all wagers to be void. 1 Chit. Con. (11th Am. ed.) 735-738; 3 Kent. Com. 277, 278. In Scotland, the courts refused to entertain such actions. *Bruce v. Ross*, 3 Paton, 107, 112; S. C. cited 3 T. R. 697, 705.

In Massachusetts, the English law on this subject has never been adopted, used, or approved, and, although the question has not been directly adjudged, it has long been understood that all wagers are unlawful. Const. Mass. c. 6, art. 6; *Amory v. Gilman*, 2 Mass. 1, 6; *Ball v. Gilbert*, 12 Met. 397, 399; *Sampson v. Shaw*, 101 Mass. 145, 150; Met. Con. 239. There are decisions or opinions to the same effect in each of the New England States. *Lewis v. Littlefield*, 15 Maine, 233; *Perkins v. Eaton*, 3 N. H. 152; *Hoit v. Hodge*, 6 N. H. 104; *Collamer v. Day*, 2 Vt. 144; *West v. Holmes*, 26 Vt. 530; *Stoddard v. Martin*, 1 R. I. 1, 2; *Wheeler v. Spencer*, 15 Conn. 28, 30. See also *Edgell v. McLaughlin*, 6 Whart. 176; *Rice v. Gist*, 1 Strob. 82.

It is inconsistent alike with the policy of our laws, and with the performance of the duties for which courts of justice are established, that judges and juries should be occupied in answering every frivolous question upon which idle or foolish persons may choose to lay a wager.

The ruling at the trial was therefore correct, and the defendant, having received the money from the stakeholder after notice from the plaintiff not to pay it over, was liable to the plaintiff under the count for money had and received. *McKee v. Manice*, 11 Cush. 357.

Exceptions overruled.¹⁹

¹⁹ See also *Bernard v. Taylor*, 23 Ore. 416.

Agreements to commit a civil wrong.**MATERNE v. HORWITZ.**

101 NEW YORK, 469.—1886.

Action for damages for refusal to accept goods tendered under contract of sale. Complaint dismissed. Plaintiff appeals from judgment of the General Term of New York City Superior Court affirming judgment. (Reported 18 J. & S. 41, where the facts appear.)

Plaintiffs sold defendants 400 cases of "domestic sardines," the boxes to have "fancy labels" on them. Domestic sardines were fish packed in Maine, and fancy labels were decorated labels containing a statement in substance that the sardines were packed in France in olive oil by persons named on the label. Imported sardines were worth about 50 per cent more than domestic. The goods tendered had on them labels as described. Plaintiffs and defendants were wholesale dealers.

MILLER, J. It must be assumed, we think, that the defendants knew when the agreement was made that they intended to purchase sardines of the kind that were tendered to them, and that the plaintiffs understood that the defendants knew it. It is also inferable that the defendants entered into the agreement, to the knowledge of the plaintiffs, for the purpose of selling the goods to others in the condition in which they were when delivered. It is also evident that the labels were used to deceive the consumers and not the contractors, and to obtain higher prices for the sardines. The plaintiffs procured and furnished the deceptive labels, after binding themselves by contract to do so, and this was done for an unlawful purpose, and with a view of furnishing goods for the market in a condition calculated to deceive the consumers who might purchase them. It is, therefore, apparent that it was part of the contract that an unlawful object was intended, of which both parties were cognizant, and that it was designed by them, under the contract, to commit a fraud and thus promote an illegal purpose by deceiving other parties. In such a case the courts will not aid either party in carrying out a fraudulent purpose.

To carry out this contract would be contrary to public policy, and in such a case, as we have seen, the court will not aid either party.

Under the Penal Code (§ 438), it is made a misdemeanor to sell or offer for sale any package falsely marked, labeled, etc., as to the place where the goods were manufactured, or the quality or grade, etc. The contract in question would seem to be covered by this provision of the Code, but as the Penal Code did not go into effect until May 1, 1882, and this contract was made June 30, 1881, the section cited has, we think, no bearing on the question presented.

The case was properly disposed of upon the ground first stated, which is fully considered and elaborated in the opinion of the General Term, Sedgwick, J., in which we concur.

The judgment should be affirmed. All concur.

Judgment affirmed.²⁰

Agreements which tend to injure the public service.

TRIST *v.* CHILD.

21 WALLACE (U. S.), 441.—187.

Bill to enjoin defendant from withdrawing the sum of \$14,559 from the United States Treasury, and for a decree commanding him to pay complainant \$5,000, and for general relief. Defense, illegality. Decree for complainant. Defendant appeals.

Defendant, having a claim against the United States for services, made an agreement with complainant's father (to whose rights as

²⁰ Where a note was given for the sale of "prolific oats" at fifteen dollars a bushel, the payee agreeing to sell eighty bushels for the maker the next year at fifteen dollars a bushel, the court said: "That this contract is void as being against public policy, we have no doubt. Any contract that binds the maker to do something opposed to the public policy of the State or nation, or that conflicts with the wants, interests or prevailing sentiment of the people, or our obligations to the world, or is repugnant to the morals of the times, is void. Any contract which has for its object the practice of deception upon the public, or upon any party in interest as to ownership of property, the nature of a transaction, the responsibility assumed by an obligation, or which is made in order to consummate a fraud upon the people or upon third persons, is void. Greenh. Pub. Pol. 136, 152. This contract is so out of the usual course of dealings as to awaken suspicion of its fairness. Ordinarily, contracts are made upon the basis of what is believed to be actual values, but this is confessedly upon the basis of most extravagant and unreal values. To carry out this contract eighty bushels

partner and personal representative complainant succeeded) that he should take charge of the claim and prosecute it before Congress, and receive as compensation 25 per cent of whatever sum Congress might appropriate. The father, and after his death, the complainant, prosecuted the claim with the result that Congress appropriated the sum of \$14,559 to pay it. Defendant refused to pay the 25 per cent stipulated and complainant filed this bill in the Supreme Court of the District of Columbia. From the evidence it appeared that personal solicitations were used to carry the bill, but there was no evidence that bribes were offered or contemplated.

MR. JUSTICE SWAYNE. The court below decreed to the appellee the amount of his claim, and enjoined Trist from receiving from the treasury "any of the money appropriated to him" by Congress, until he should have paid the demand of the appellee.

This decree, as regards that portion of the fund not claimed by the appellee, is an anomaly. Why the claim should affect that part of the fund to which it had no relation is not easy to be imagined. This feature of the decree was doubtless the result of oversight and inadvertence. The bill proceeds upon the grounds of the validity of the original contract, and a consequent lien in favor of the complainant upon the fund appropriated. We shall examine the latter ground first. Was there, in any view of the case, a lien?

of grain had to be sold to some person on or before September 1, 1888, for more than thirty times their value. This could only be done by grossly deceiving the purchaser as to their value, or repeating the scheme upon which this contract was made, or one similar. That such a scheme could not be repeated year after year is evident, so that in the end some person must be deceived into paying many times the value of the oats. If it was not intended upon the part of the company to carry out the contract, then the fraud was consummated the sooner. View the transaction as you may, and it discloses a cunningly-devised plan to cheat and defraud. 'Whenever any contract conflicts with the morals of the time and contravenes any established interests of society, it is void as being against public policy.' Story, *Conf. Laws*, sec. 546. Surely a contract that cannot be performed without deception and fraud conflicts with the morals of the time, and contravenes the established interest of society. There was no error in instructing the jury that this contract is fraudulent and void as between the original parties to it. In this connection, see *McNamara v. Gargett*, 68 Mich. 454; 36 N. W. Rep. 218, wherein the Supreme Court of Michigan held a similar contract void as being against public policy. True, in that case the contract is said to be a gambling contract, but it is declared to be against public policy on other grounds."—Given, J., in *Merrill v. Packer*, 80 Iowa 542.

It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. *Yeates v. Groves*, 1 Vesey, Jr. 280; *Lett v. Morris*, 4 Simons, 607; *Bradley v. Root*, 5 Paige, 632; 2 Story's Equity, § 1047. A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee. *Field v. The Mayor*, 2 Selden, 179. But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund *pro tanto*, either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor. *Wright v. Ellison*, 1 Wallace, 16; *Hoyt v. Story*, 3 Barbour's Supreme Court, 264; *Malcolm v. Scott*, 3 Hare, 39; *Rogers v. Hosack*, 18 Wendell, 319.

Viewing the subject in the light of these authorities, we are brought to the conclusion that the appellee had no lien upon the fund here in question. The understanding between the elder Child and Trist was a personal agreement. It could in nowise produce the effect insisted upon. For a breach of the agreement, the remedy was at law, not in equity, and the defendant had a constitutional right to a trial by jury. *Wright v. Ellison*, 1 Wallace, 16. If there was no lien, there was no jurisdiction in equity.

There is another consideration fatally adverse to the claim of a lien. The first section of the act of Congress of February 26, 1853, declares that all transfers of any part of any claim against the United States, "or of any interest therein, whether absolute or conditional, shall be absolutely null and void, unless executed in the presence of at least two attesting witnesses after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant therefor." That the claim set up in the bill to a specific part of the money appropriated is within this statute is too clear to admit of doubt. It would be a waste of time to discuss the subject.

But there is an objection of still greater gravity to the appellee's case.

Was the contract a valid one? It was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing for the payment of the claim. The aid asked by the younger Child of Trist, which indicated what he considered needful, and doubtless proposed to do and did do himself, is thus vividly pictured in his

letter to Trist of the 20th February, 1871. After giving the names of several members of Congress, from whom he had received favorable assurances, he proceeds: "Please write to your friends to write to any member of Congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Set every man you know at work. Even if he knows a page, for a page often gets a vote."

In the Roman law it was declared that "a promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding." Institutes of Justinian, lib. 3, tit. 19, par. 24. In our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals. Lord Mansfield said (*Jones v. Randall*, 1 Cowper, 39): "Many contracts which are not against morality, are still void as being against the maxims of sound policy."

It is a rule of the common law of universal application, that where a contract express or implied is tainted with either of the vices last named, as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice.

Before considering the contract here in question, it may be well, by way of illustration, to advert to some of the cases presenting the subject in other phases, in which the principle has been adversely applied.

Within the condemned category are:

An agreement—to pay for supporting for election a candidate for sheriff, *Swayze v. Hull*, 3 Halsted, 54; to pay for resigning a public position to make room for another, *Eddy v. Capron*, 4 Rhode Island, 395; *Parsons v. Thompson*, 1 H. Blackstone, 322; to pay for not bidding at a sheriff's sale of real property, *Jones v. Caswell*, 3 Johnson's Cases, 29; to pay for not bidding for articles to be sold by the government at auction, *Doolin v. Ward*, 6 Johnson, 194; to pay for not bidding for a contract to carry the mail on a specified route, *Gulick v. Bailey*, 5 Halsted, 87; to pay a person for his aid and influence in procuring an office, and for not being a candidate himself, *Gray v. Hook*, 4 Comstock, 449; to pay for procuring a contract from the government, *Tool Company v. Norris*, 2 Wallace, 45; to pay for procuring signatures to a petition to the governor for a pardon, *Hatzfeld v. Gulden*, 7 Watts, 152; to sell land to a particular person when the surrogate's order to sell should have been

obtained, *Overseers of Bridgewater v. Overseers of Brookfield*, 3 Cowen, 299; to pay for suppressing evidence and compounding a felony, *Collins v. Blantern*, 2 Wilson, 347; to convey and assign a part of what should come from an ancestor by descent, devise, or distribution, *Boynton v. Hubbard*, 7 Massachusetts, 112; to pay for promoting a marriage, *Scribblehill v. Brett*, 4 Brown's Parliamentary Cases, 144; *Arundel v. Trevillian*, 1 Chancery Reports, 87; to influence the disposition of property by will in a particular way, *Debenham v. Ox*, 1 Vesey, Sr. 276; see also Addison on Contracts, 91; 1 Story's Equity, ch. 7; *Collins v. Blantern*, 1 Smith's Leading Cases, 676, American note.

The question now before us has been decided in four American cases. They were all ably considered, and in all of them the contract was held to be against public policy, and void. *Clippinger v. Hepbaugh*, 5 Watts & Sergeant, 315; *Harris v. Roof's Executor*, 10 Barbour's Supreme Court, 489; *Rose & Hawley v. Truax*, 21 Id. 361; *Marshall v. Baltimore and Ohio Railroad Company*, 16 Howard, 314. We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them, orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business.

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. 1 Montesquieu, Spirit of Laws, 17. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of

right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments.

The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

If the instances were numerous, open, and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring-head and the stream of legislation are polluted.

To legalize the traffic of such service, would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views, we follow the lead of reason and authority.

We are aware of no case in English or American jurisprudence like the one here under consideration, where the agreement has not been adjudged to be illegal and void.

We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, *potior conditio defendentis*. Where there is turpitude, the law will help neither party.

The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to the legal principles we have considered, nor in their application to the case in hand. The law is no respecter of persons.

Decree reversed, and the case remanded, with directions to

Dismiss the bill.

Agreements which tend to stifle criminal proceedings.**PARTRIDGE v. HOOD.**

120 MASSACHUSETTS, 403.—1876.

Contract. The answer averred that the consideration of the contract was an agreement on the part of the plaintiff to stop a criminal prosecution against Edward K. Hood, the defendant's son. The court ruled that the agreement was illegal and directed judgment for defendant. Plaintiff alleged exceptions.

GRAY, C. J. The reason that a private agreement, made in consideration of the suppression of a prosecution for crime, is illegal, is that it tends to benefit an individual at the expense of defeating the course of public justice. The doctrine has never been doubted as applied to felonies, and the English authorities before our Revolution extended it to all crimes. 2 West Symb. Compromise & Arbitrament, § 33; *Horton v. Benson*, 1 Freem. 204; Bac. Ab. Arbitrament & Award, A; *Johnson v. Ogilby*, 3 P. Wms. 277, and especially the register's book cited by Mr. Cox in a note to page 279; *Collins v. Blantern*, 2 Wils. 341; 4 Bl. Com. 363, 364. An appeal of mayhem could be barred by arbitrament, or accord and satisfaction, or release of all personal actions, because it was the suit of the appellant and not of the Crown, and subjected the appellee to damages only, like an action of trespass. *Blake's Case*, 6 Rep. 43, *b*, 44 *c*; 2 Hawk. c, 23, §§ 24, 25.

Some confusion was introduced into the English law upon this subject by the rulings of Lord Kenyon: *Kyd on Awards* (Am. ed.), 64-68; *Drage v. Ibberson*, 2 Esp. 643; *Fallowes v. Taylor*, Peake Ad. Cas. 155; S. C. 7 T. R. 475; and by Mr. Justice Le Blanc's suggestion of a distinction between a prosecution for public misdemeanor and one for a private injury to the prosecutor. *Edgcombe v. Rodd*, 5 East, 294, 303; S. C. 1 Smith, 515, 520. This confusion was not wholly removed by the opinions of Lord Ellenborough in *Edgcombe v. Rodd*, 5 East, 294, 302; in *Wallace v. Hardacre*, 1 Camp. 45, 46; in *Pool v. Bousfield*, 1 Camp. 55, and in *Beeley v. Wingfield*, 11 East, 46, 48; of Chief Justice Gibbs in *Baker v. Townshend*, 1 Moore, 120, 124; S. C. 7 Taunt. 422, 426; or of Lord Denman in *Keir v. Leeman*, 6 Q. B. 308, 321.

But in the very able judgment of the Exchequer Chamber in

Keir v. Leeman (9 Q. B. 371, 395), Chief Justice Tindal, after reviewing the previous cases, summed up the matter thus:

“Indeed, it is very remarkable what very little authority there is to be found, rather consisting of *dicta* than decisions, for the principle that any compromise of a misdemeanor, or indeed of any public offense, can be otherwise than illegal, and any promise founded on such a consideration otherwise than void. If the matter were *res integra*, we should have no doubt on this point. We have no doubt that, in all offenses which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so, but we are not disposed to extend this any further.”

In *Fisher v. Apollinaris Co.* (L. R. 10 Ch. 297) the plaintiff, pursuant to an agreement of the defendants to abandon a prosecution against him under St. 25 & 26 Vict. c. 88, for a violation of their trade-mark, gave them a letter of apology, with authority to make use of it as they might think necessary, and, after they had published it by advertisement for two months, filed a bill in equity to restrain them from continuing the publication, which was dismissed by the lords justices. The principal grounds of the decision appear to have been that the defendants had done nothing that the plaintiff had not authorized them to do; and that, even if the publication affected the plaintiff's reputation, a court of chancery had no jurisdiction to restrain it. See *Prudential Assurance Co. v. Knott*, L. R. 10 Ch. 142; *Boston Diatite Co. v. Florence Manufacturing Co.*, 114 Mass. 69. It was indeed observed that “it was no more a violation of the law to accept an apology in such a case than it would be to compromise an indictment for a nuisance or for not repairing a highway on the terms of the defendants agreeing to remove the nuisance or repair the highway.” L. R. 10 Ch. 302. But this observation was not necessary to the decision; and in *The Queen v. Blakemore* (14 Q. B. 544) an agreement for the compromise of an indictment for not repairing a highway was held illegal and void. All the other recent English authorities support the judgment of Chief Justice Tindal, above quoted. *The Queen v. Hardey*, 14 Q. B. 529, 541; *Clubb v. Hutson*, 18 C. B. (N. S.) 414; *Williams v. Bayley*, L. R. 1 H. L. 200, 213, 320.

In *Jones v. Rice* (18 Pick. 440, 442), Mr. Justice Putnam delivering the opinion of this court, after alluding to the English cases

in the time of Lord Kenyon, relied on to "sustain the distinction between considerations arising from the compounding of felonies, which is admitted to be illegal, and the compounding of misdemeanors, which is alleged to be lawful," said:

"We do not think that such a power is vested in individuals. It would enable them to use the claim of the government for their own emolument, and greatly to the oppression of the people. It has a direct tendency to obstruct the course of the administration of justice; and the mischief extends, we think, as well to misdemeanors as to felonies. The power to stop prosecutions is vested in the law officers of the commonwealth, who use it with prudence and discretion. If it were given to the party injured, who might be the only witness who could prove the offense, he might extort for his own use money which properly should be levied as a fine upon the criminal party for the use of the commonwealth."

It is true that the prosecution in *Jones v. Rice* was for a riot as well as for an assault. But the language and the reasoning of the opinion extend to the compounding of any offense whatever. Any act which is made punishable by law as a crime is an offense against the public, and, especially in this country, where all prosecutions are subject to the control of official prosecutors, and not of the individuals immediately injured, cannot lawfully be made the subject of private compromise, except so far as expressly authorized by statute. And this view is supported by the great weight of American authority. *Hinds v. Chamberlin*, 6 N. H. 225; *Shaw v. Spooner*, 9 N. H. 197; *Shaw v. Reed*, 30 Maine, 105; *Bowen v. Buck*, 28 Vt. 308; *People v. Bishop*, 5 Wend. 111; *Noble v. Peebles*, 13 S. & R. 319, 322; *Maurer v. Mitchell*, 9 W. & S. 69, 71; *Cameron v. M'Farland*, 2 Car. Law Rep. 415; *Corley v. Williams*, 1 Bailey, 588; *Vincent v. Groom*, 1 Yerger, 430; Met. Con. 226, 227; 1 Story Eq. Jur. § 294.

The legislature of the commonwealth has defined the cases and circumstances in which the compromise of a prosecution shall be allowed. By a provision first introduced in the Revised Statutes, when a person is committed or indicted for an assault and battery or other misdemeanor for which the party injured may have a remedy by civil action (except when committed by or upon an officer of justice, or riotously, or with intent to commit a felony), if the party injured appears before the magistrate or court and acknowledges satisfaction for the injury sustained, a stay of proceedings may be ordered. Rev. Sts. c. 135, § 25; c. 136, § 27; Gen. Sts. c. 170, § 33; c. 171, § 28. Such an acknowledgment

of satisfaction does not entitle the defendant to be discharged, but leaves it to the discretion of the magistrate or court whether a stay of proceedings is consistent with the interests of public justice. *Commonwealth v. Dowdican's Bail*, 115 Mass. 133. See also *State v. Hunter*, 14 La. Ann. 71.

In the case at bar, it being found as a fact that the agreement sued on was entered into by the defendant for the purpose of compounding a complaint against her son for a misdemeanor, and it not appearing that satisfaction has ever been acknowledged in or approved by the court in which the prosecution was pending, judgment was rightly ordered for the defendant.

Exceptions overruled.²¹

Agreements which tend to cause a restraint of trade.

DIAMOND MATCH CO. v. ROEBER.

106 NEW YORK, 473.—1887.

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, made March 20, 1885, which modified as to an additional allowance of costs and affirmed, as modified, a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to restrain the defendant from engaging in the manufacture or sale of friction matches in violation of a covenant in a bill of sale executed by defendant, which is set forth in the opinion, wherein also the material facts are stated.

ANDREWS, J. Two questions are presented: *First*. Whether the covenant of the defendant contained in the bill of sale executed by him to the Swift & Courtney & Beecher Company on the 27th day of August, 1880, "that he shall and will not, at any time or times within ninety-nine years, directly or indirectly, engage in the manufacture or sale of friction matches (excepting in the capacity of agent or employé of said The Swift & Courtney & Beecher Company), within any of the several States of the United States of America, or in the Territories thereof, or within the Dis-

²¹ See also *Goodrich v. Tenney*, 144 Ill. 422 (agreement to procure testimony); *Bowman v. Phillips*, 41 Kans. 364 (agreement to defend for future violations of law).

trict of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the State of Nevada and in the Territory of Montana," is void as being a covenant in restraint of trade; and, *second*, as to the right of the plaintiff, under the special circumstances, to the equitable remedy by injunction to enforce the performance of the covenant.

There is no real controversy as to the essential facts. The consideration of the covenant was the purchase by the Swift & Courtney & Beecher Company, a Connecticut corporation, of the manufactory No. 528 West Fiftieth Street, in the city of New York, belonging to the defendant, in which he had, for several years prior to entering into the covenant, carried on the business of manufacturing friction matches, and of the stock and materials on hand, together with the trade, trade-marks, and good will of the business, for the aggregate sum (excluding a mortgage of \$5000 on the property, assumed by the company) of \$46,724.05, of which \$13,000 was the price of the real estate. By the preliminary agreement of July 27, 1880, \$28,000 of the purchase price was to be paid in the stock of the Swift & Courtney & Beecher Company. This was modified when the property was transferred August 27, 1880, by giving to the defendant the option to receive the \$28,000 in the notes of the company or in its stock, the option to be exercised on or before January 1, 1881. The remainder of the purchase price, \$18,724.05, was paid down in cash, and subsequently, March 1, 1881, the defendant accepted from the plaintiff, the Diamond Match Company, in full payment of the \$28,000, the sum of \$8000 in cash and notes, and \$20,000 in the stock of the plaintiff, the plaintiff company having, prior to said payment, purchased the property of the Swift & Courtney & Beecher Company and become the assignee of the defendant's covenant. It is admitted by the pleadings that in August, 1880 (when the covenant in question was made), the Swift & Courtney & Beecher Company carried on the business of manufacturing friction matches in the States of Connecticut, Delaware, and Illinois, and of selling the same "in the several States and Territories of the United States and in the District of Columbia;" and the complaint alleges, and the defendant in his answer admits, that he was at the same time also engaged in the manufacture of friction matches in the city of New York, and in selling them in the same territory. The proof tends to support the admission in the pleadings. It was shown that the defendant employed traveling salesmen, and that his matches were

found in the hands of dealers in ten States. The Swift & Courtney & Beecher Company also sent their matches throughout the country wherever they could find a market. When the bargain was consummated, on the 27th of August, 1880, the defendant entered into the employment of the Swift & Courtney & Beecher Company, and remained in its employment until January, 1881, at a salary of \$1500 a year. He then entered into the employment of the plaintiff and remained with it during the year 1881, at a salary of \$2500 a year, and from January 1, 1882, at a salary of \$3600 a year, when a disagreement arising as to the salary he should thereafter receive, the plaintiff declining to pay a salary of more than \$2500 a year, the defendant voluntarily left its service. Subsequently he became superintendent of a rival match manufacturing company in New Jersey, at a salary of \$5000, and he also opened a store in New York for the sale of matches other than those manufactured by the plaintiff. The contention by the defendant that the plaintiff has no equitable remedy to enforce the covenant, rests mainly on the fact that contemporaneously with the execution of the covenant of August 27, 1880, the defendant also executed to the Swift & Courtney & Beecher Company a bond in the penalty of \$15,000, conditioned to pay that sum to the company as liquidated damages in case of a breach of his covenant.

The defendant for his main defense relies upon the ancient doctrine of the common law first definitely declared, so far as I can discover, by Chief Justice Parker (Lord Macclesfield) in the leading case of *Mitchel v. Reynolds* (1 P. Williams, 181), and which has been repeated many times by judges in England and America, that a bond in general restraint of trade is void. There are several decisions in the English courts of an earlier date in which the question of the validity of contracts restraining the obligor from pursuing his occupation within a particular locality was considered. The cases are chronologically arranged and stated by Mr. Parsons in his work on Contracts, Vol. 2, p. 748, note. The earliest reported case, decided in the time of Henry V., was a suit on a bond given by the defendant, a dyer, not to use his craft within a certain city for the space of half a year. The judge before whom the case came indignantly denounced the plaintiff for procuring such a contract, and turned him out of court. This was followed by cases arising on contracts of a similar character, restraining the obligors from pursuing their trade within a certain place, for a certain time, which apparently presented the same question which

had been decided in the dyer's case, but the courts sustained the contracts and gave judgment for the plaintiffs; and, before the case of *Mitchel v. Reynolds*, it had become settled that an obligation of this character, limited as to time and space, if reasonable under the circumstances and supported by a good consideration, was valid. The case in the Year Books went against all contracts in restraint of trade, whether limited or general. The other cases, prior to *Mitchel v. Reynolds*, sustained contracts for a particular restraint, upon special grounds, and by inference decided against the validity of general restraints. The case of *Mitchel v. Reynolds* was a case of partial restraint and the contract was sustained. It is worthy of notice that most, if not all, the English cases which assert the doctrine that all contracts in general restraint of trade are void, were cases where the contract before the court was limited or partial. The same is generally true of the American cases. The principal cases in this State are of that character, and in all of them the particular contract before the court was sustained (*Nobles v. Bates*, 7 Cow. 307; *Chappel v. Brockway*, 21 Wend. 157; *Dunlop v. Gregory*, 10 N. Y. 241). In *Alger v. Thacher* (19 Pick. 51), the case was one of general restraint, and the court, construing the rule as inflexible that all contracts in general restraint of trade are void, gave judgment for the defendant. In *Mitchel v. Reynolds*, the court, in assigning the reasons for the distinction between a contract in general restraint of trade, and one limited to a particular place, says, "for the former of these must be void, being of no benefit to either party and only oppressive;" and later on, "because in a great many instances they can be of no use to the obligee, which holds in all cases of general restraint throughout England, for what does it signify to a tradesman in London what another does in Newcastle, and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." He refers to other reasons, viz.: The mischief which may arise (1) to the party by the loss, by the obligor, of his livelihood and the subsistence of his family; and (2) to the public, by depriving it of a useful member and by enabling corporations to gain control of the trade of the kingdom.

It is quite obvious that some of these reasons are much less forcible now than when *Mitchel v. Reynolds* was decided. Steam and electricity have, for the purposes of trade and commerce, almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffu-

sion of wealth and the restless activity of mankind striving to better their condition, has greatly enlarged the field of human enterprise and created a vast number of new industries, which give scope to ingenuity, and employment for capital and labor. The laws no longer favor the granting of exclusive privileges, and, to a great extent, business corporations are practically partnerships, and may be organized by any persons who desire to unite their capital or skill in business, leaving a free field to all others who desire for the same or similar purposes to clothe themselves with a corporate character.

The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void irrespective of special circumstances. Indeed, it has of late been denied that a hard and fast rule of that kind has ever been the law of England (*Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351). The law has, for centuries, permitted contracts in partial restraint of trade, when reasonable; and in *Horner v. Graves* (7 Bing. 735), Chief Justice Tindal considered a true test to be "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." When the restraint is general, but at the same time is coextensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint coextensive with the business which he sells? If such a contract is permitted, is the seller any more likely to become a burden on the public than the man who, having built up a local trade only, sells it, binding himself not to carry it on in the locality? Are the opportunities for employment and for the exercise of useful talents so shut up and hemmed in that the public is likely to lose a useful member of society in one case and not in the other? Indeed, what public policy requires is often a vague and difficult inquiry. It is clear that

public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions. "If," said Sir George Jessel, in *Printing Company v. Sampson*, L. R. 19 Eq. Cas. 462, "there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily, shall be held good, and shall be enforced by courts of justice."

It has sometimes been suggested that the doctrine that contracts in general restraint of trade are void, is founded in part upon the policy of preventing monopolies, which are opposed to the liberty of the subject, and the granting of which by the king under claim of royal prerogative led to conflicts memorable in English history. But covenants of the character of the one now in question operate simply to prevent the covenantor from engaging in the business which he sells, so as to protect the purchaser in the enjoyment of what he has purchased. To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege. If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint, where the trade is local, are subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or calling, and prevent his becoming a competitor with the covenantee. We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties. Combinations between producers to limit production and to enhance prices, are or may be unlawful, but they stand on a different footing. We cite some of the cases showing the tendency of recent judicial opinion on the general subject. *Whittaker v. Howe*, 3 Beav. 383; *Jones v. Lees*, 1 Hurl. & N. 189; *Roussillon v. Roussillon*, *supra*; *Leather Co. v.*

Lorsont, L. R. 9 Eq. Cas. 345; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Oregon Steam Co. v. Winsor*, 20 Wall. 64; *Morse v. Morse*, 103 Mass. 73. In *Whittaker v. Howe*, a contract made by a solicitor not to practice as a solicitor "in any part of Great Britain," was held valid. In *Roussillon v. Roussillon*, a general contract not to engage in the sale of champagne, without limit as to space, was enforced as being under the circumstances a reasonable contract. In *Jones v. Lees*, a covenant by the defendant, a licensee under a patent that he would not during the license make or sell any slubbing machines without the invention of the plaintiff applied to them, was held valid. Bramwell, J., said: "It is objected that the restraint extends to all England, but so does the privilege." In *Oregon Steam Co. v. Winsor*, the court enforced a covenant by the defendant, made on the purchase of a steamship, that it should not be run or employed in the freight or passenger business upon any waters in the State of California for the period of ten years.

In the present state of the authorities we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed.

The covenant in the present case is partial and not general. It is practically unlimited as to time, but this, under the authorities, is not an objection, if the contract is otherwise good. *Ward v. Byrne*, 5 M. & W. 548; *Mumford v. Gething*, 7 C. B. (N. S.), 305, 317. It is limited as to space since it excepts the State of Nevada and the Territory of Montana from its operation, and therefore is a partial and not a general restraint, unless, as claimed by the defendant, the fact that the covenant applies to the whole of the State of New York constitutes a general restraint within the authorities. In *Chappel v. Brockway*, *supra*, Bronson, J., in stating the general doctrine as to contracts in restraint of trade, remarked that "contracts which go to the total restraint of trade, as that a man will not pursue his occupation anywhere in the State, are void." The contract under consideration in that case was one by which the defendant agreed not to run or be interested in a line of packet boats on the canal between Rochester and Buffalo. The attention of the court was not called to the point whether a contract was partial, which related to a business extending over the whole country, and which restrained the carrying on of business in

the State of New York, but excepted other States from its operation. The remark relied upon was *obiter*, and in reason cannot be considered a decision upon the point suggested. We are of the opinion that the contention of the defendant is not sound in principle, and should not be sustained. The boundaries of the States are not those of trade and commerce, and business is restrained within no such limit. The country, as a whole, is that of which we are citizens, and our duty and allegiance are due both to the State and nation. Nor is it true, as a general rule, that a business established here cannot extend beyond the State, or that it may not be successfully established outside of the State. There are trades and employments which, from their nature, are localized; but this is not true of manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon State lines, and we cannot say that the exception of Nevada and Montana was colorable merely. The rule itself is arbitrary, and we are not disposed to put such a construction upon this contract as will make it a contract in general restraint of trade, when upon its face it is only partial. The case of *Oregon Steam Co. v. Winsor* (*supra*) supports the view that a restraint is not necessarily general which embraces an entire State. The defendant entered into the covenant as a consideration in part of the purchase of his property by the Swift & Courtney & Beecher Company, presumably because he considered it for his advantage to make the sale. He realized a large sum in money, and on the completion of the transaction became interested as a stockholder in the very business which he had sold. We are of opinion that the covenant, being supported by a good consideration, and constituting a partial and not a general restraint, and being, in view of the circumstances disclosed, reasonable, is valid and not void.

In respect to the second general question raised, we are of opinion that the equitable jurisdiction of the court to enforce the covenant by injunction, was not excluded by the fact that the defendant, in connection with the covenant, executed a bond for its performance, with a stipulation for liquidated damages. It is, of course, competent for parties to a covenant to agree that a fixed sum shall be paid in case of a breach by the party in default, and that this should be the exclusive remedy. The intention in that case would be manifest that the payment of the penalty should be the price of non-performance, and to be accepted by the covenantee

in lieu of performance. *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400, 405. But the taking of a bond in connection with a covenant does not exclude the jurisdiction of equity in a case otherwise cognizable therein, and the fact that the damages in the bond are liquidated, does not change the rule. It is a question of intention, to be deduced from the whole instrument and the circumstances; and if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of a breach, the covenant will be enforced. It was said in *Long v. Bowring* (33 Beav. 585), which was an action in equity for the specific performance of a covenant, there being also a clause for liquidated damages, "all that is settled by this clause is that if they bring an action for damages the amount to be recovered is £1000, neither more nor less." There can be no doubt upon the circumstances in this case that the parties intended that the covenant should be performed, and not that the defendant might at his option repurchase his right to manufacture and sell matches on payment of the liquidated damages. The right to relief by injunction in similar contracts is established by numerous cases. *Phoenix Ins. Co. v. Continental Ins. Co.*, *supra*; *Long v. Bowring*, *supra*; *Howard v. Woodward*, 10 Jur. N. S. 1123; *Coles v. Sims*, 5 De G., McN & G. 1; *Avery v. Langford*, Kay's Ch. 663; *Whittaker v. Howe*, *supra*; *Hubbard v. Miller*, 27 Mich. 15.

There are some subordinate questions which will be briefly noticed.

First. The plaintiff, as successor of the Swift & Courtney & Beecher Company, and as assignee of the covenant, can maintain the action. The obligation runs to the Swift & Courtney & Beecher Company, "its successors and assigns." The covenant was in the nature of a property-right and was assignable, at least it was assignable in connection with a sale of the property and business of the assignors. *Hedge v. Lowe*, 47 Iowa, 137, and cases cited. *Second.* The defendant is not in a position which entitles him to raise the question that the contract with the Swift & Courtney & Beecher Company was *ultra vires* the powers of that corporation. He has retained the benefit of the contract and must abide by its terms. *Whitney Arms Co. v. Barlow*, 68 N. Y. 34. *Third.* The fact that the plaintiff is a foreign corporation is no objection to its maintaining the action. It would be repugnant to the policy of our legislation, and a violation of the rules of comity, to grant or withhold relief in our courts upon such a discrimination. *Mer-*

rick v. Van Santvoord, 34 N. Y. 208; *Hibernia Nat. Bank v. Lacombe*, 84 Id. 367; Code Civ. Pro. § 1779. *Fourth.* The consent of the Swift & Courtney & Beecher Company to the purchase by the defendant of the business of Brueggemann did not relieve the defendant from his covenant. That transaction was in no way inconsistent therewith. Brueggemann was selling matches manufactured by the company, under an agreement to deal in them exclusively.

There are some questions on exceptions to the admission and exclusion of evidence. None of them present any question requiring a reversal of the judgment.

There is no error disclosed by the record and the judgment should, therefore, be affirmed.

All concur, except Peckham, J., dissenting.

Judgment affirmed.²²

²² "The latest decisions of courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. The courts do not go to the length of saying that contracts which they now would say are in restraint of trade are, nevertheless, valid contracts, and to be enforced; they do, however, now hold many contracts not open to the objection that they are in restraint of trade which a few years back would have been avoided on that sole ground, both here and in England. The cases in this court, which are the latest manifestations of the turn in the tide, are cited in the opinion of this case at General Term, and are *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Hodge v. Sloan*, 107 N. Y. 244; *Leslie v. Lorillard*, 110 N. Y. 519."—Peckham, J., in *Matthews v. Associated Press*, 136 N. Y. 333, 340.

"While the law, to a certain extent, tolerates contracts in restraint of trade or business when made between vendor and purchaser, and will uphold them, they are not treated with special indulgence. They are intended to secure to the purchaser of the good will of a trade or business a guaranty against the competition of the former proprietor. When this object is accomplished it will not be presumed that more was intended."—Maynard, J., in *Greenfield v. Gilman*, 140 N. Y. 168, 173.

"In the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 West Va. 600; *Chicago Gas & Co. v. People's Gas Co.*, 121 Illinois 530; *Western Union Telegraph Co. v. American Union Telegraph Co.*, 65 Georgia, 160."—Mr. Chief Justice Fuller, in *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 408, 409.

See also *Richards v. American Desk & Co. Co.* (Wis.), 58 N. W. Rep. 787; *Santa Clara & Co. v. Hayes*, 76 Cal. 387.

Effect of illegality upon a contract which is divisible.**ERIE RAILWAY CO. v. UNION LOCOMOTIVE AND EXPRESS CO.**

35 NEW JERSEY LAW, 240.—1871.

This suit was in case on promises. Defendants demurred generally to the whole declaration, and there was a joinder.

BEASLEY, C. J. Upon the argument before this court, the counsel for the defendants relied chiefly, in support of the demurrer, upon the proposition that the stipulation contained in the article of agreement, which gave to the plaintiffs the exclusive right to carry locomotives and tenders on trucks over the Erie road, was illegal. The principle that, as common carriers, the defendants were bound to exercise their office with perfect impartiality, in behalf of all persons who apply to them, and that, practicing this public employment, they cannot discharge themselves, by contract, from the obligation, was appealed to in support of this position.

The agreement between these parties was, in short, this: The firm of Kasson & Company, who were the assignors of the plaintiffs, the Union Locomotive and Express Company, agreed to provide "cars and trucks sufficient in size, strength, weight, and capacity whereon to carry all locomotive engines and tenders," and that they would be at the expense of loading and unloading the same; and for the motive power, which was to be supplied by the Erie Railway Company, the defendants, and for the unusual wear and strain of their railway, a certain compensation, which was stated in said articles of agreement, was promised to be paid. On their side, the Erie Railway Company agreed, in addition to the stipulations for providing motive power and giving the use of the road, that the cars of the assignors of plaintiffs should be the only cars employed in the transportation of locomotive engines and tenders. It is this last provision which gives rise to the objection already stated. It is insisted this stipulation gives the plaintiffs the exclusive control, on their own terms, of this branch of business; that it precludes all competition, and being the grant of a monopoly, is inconsistent with the purpose and objects of the charter of the defendants, and with their character as common carriers. The question thus presented is one of much importance, and

it should not, consequently, be decided except when it shall be an element essential to the judgment of the court in the particular case. That it is not such an element, on the present occasion, is obvious, for, let it be granted that the provision in question is illegal, and therefore void, still such concession cannot, in the least degree, impair the plaintiffs' right of action. The suit is not for a breach of this promise of the defendants, that no other cars but those of the plaintiffs shall be employed in this branch of the carrying business, but it is for the refusal of the defendants to permit the plaintiffs to transport locomotives and tenders, according to their contract, over the railway of the Erie Company. This latter stipulation, the violation of which forms the ground of action, is distinct and entirely separable from the former one, in which it is alleged the illegality before mentioned exists.

Admitting, then, for the purpose of the argument, the illegality insisted on, the legal problem plainly is this: whether, when a defendant has agreed to do two things, which are entirely distinct, and one of them is prohibited by law, and the other is legal and unobjectionable, such illegality of the one stipulation can be set up as a bar to a suit for a breach of the latter and valid one. This point was but slightly noticed on the argument; nevertheless, an examination of the authorities will show that the rule of law upon the subject has, from the earliest times, been at rest. It was unanimously agreed, in a case reported in the Year Books, 14 Henry VIII. 25, 26, that if some of the covenants of an indenture, or of the conditions indorsed upon a bond, are against law, and some good and lawful, that in such case, the covenants or conditions which are against law are void *ab initio*, and the others stand good. And from that day to this, I do not know that this doctrine, to the extent of its applicability to this case, has anywhere been disallowed. It was the ground of the judgment in *Chesman v. Nainby* (2 Lord Raymond, 1456), that being a suit on an apprentice's bond. The stipulation alleged to have been broken was, that the apprentice would not carry on the business in which she was to be instructed, within "the space of half a mile" of the then dwelling-house of the plaintiff. There was also a further stipulation that she should not carry on this business within half a mile of any house into which the plaintiff might remove. The suit was for a breach of the former stipulation, and it was admitted that the latter one was void, as imposing an unreasonable restraint on

trade, and it was urged that, by force of this illegal feature, the whole contract was void. But the court were unanimously of opinion that as the breach was assigned upon that part of the condition which was good in law, therefore if the other part, to which exception was taken, was against law, yet that would not hinder the recovery upon part of the condition which was legal. The judgment was afterwards affirmed by the twelve judges, on an appeal to Parliament. 3 Bro. Parl. c. 349.

This rule of law was treated as settled, and was similarly applied in the modern cases of *Mallan v. May*, 11 M. & W. 653, and *Price v. Green*, 16 M. & W. 346. This same legal principle will be found to be discussed and illustrated by different applications in the following decisions: *Gaskell v. King*, 11 East, 165; 15 Ib. 440; *Nicholls v. Stretton*, 10 Adol. & El. N. S. 346; *Chester v. Freeland*, Ley R. 79; *Sheerman v. Thompson*, 11 Adol. & El. 1027.

These and other authorities which might be referred to, settle the rule, that the fact that one promise is illegal will not render another disconnected promise void. The doctrine will not embrace cases where the objectionable stipulation is for the performance of an immoral or criminal act, for such an ingredient will taint the entire contract, and render it unenforceable in all its parts, by reason of the maxim *ex turpi causa non oritur actio*. Nor will it, in general, apply where any part of the consideration is illegal, so that in the present case, if, upon the trial, it should appear that the plaintiffs have agreed to pay to the defendants more than the charter of the latter allows, it may become a question whether this suit will lie. There are many decisions to the effect that where there are a number of considerations, and any one of them is illegal, the whole agreement is avoided, this doctrine being put upon the ground of the impossibility of saying how much or how little weight the void portion may have had as an inducement to the contract. But, at the present stage of the cause, the entire consideration of the promise sued on must be regarded by the court as unobjectionable, as there is nothing on the record to show any overcharge.

On the ground, then, that both the consideration and the promise, which is the foundation of the action, appear to be valid, the plaintiffs must have judgment on this demurrer.

It is proper to remark that as the demurrer is a general one to

the whole declaration, I have considered only the cause of action set out in the first count.

Judgment for plaintiffs.²³

Effect of illegality upon a contract which is indivisible.

BIXBY *v.* MOOR.

51 NEW HAMPSHIRE, 402.—1871.

Assumpsit, by Joseph C. Bixby against Moor & Gage, to recover pay for services rendered by the plaintiff for the defendants from October 1, 1861, to December 20, 1863. The defendants kept a billiard saloon and bar. The sale of liquor was illegal. The plaintiff was employed by the defendants to work generally in and about the saloon, but there was no special agreement that he should or should not sell liquors. He opened the saloon, built fires, took care of billiard tables, waited on customers at the bar, and in the absence of defendants had the whole charge of the business.

SMITH, J. The plaintiff would have been entitled to the reasonable worth of his entire services, if no part of them had been rendered in an illegal business. It must be conceded that he cannot recover for his services in the sale of liquor; but he claims that a portion of his services was rendered in a legal employment, and that he can recover the value of that portion. The defendants contend that no part of the services was rendered in a legal business, arguing that the keeping of the billiard tables was so far connected with and in furtherance of the liquor traffic, that it must be regarded as part and parcel of the same, falling under the same legal condemnation. Whether the latter position is well founded would seem to be a question of fact; but it need not be considered here, for we are of opinion that, even if part of the business was lawful, still the plaintiff cannot recover.

If the consideration for the defendants' promise to pay the plaintiff a reasonable compensation was the plaintiff's promise to

²³ Accord: *United States v. Bradley*, 10 Pet. 343, 360-364; *Gelpeke v. Dubuque*, 1 Wall. (U. S.) 221; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. (U. S.) 64; *Dean v. Emerson*, 102 Mass. 480; *Peltz v. Eichele*, 62 Mo. 171; *Smith's Appeal*, 113 Pa. St. 579. Contra: *Lindsay v. Smith*, 78 N. C. 328.

perform both classes of services, the illegal as well as the legal, it is clear that the defendants' promise could not be enforced. A contract is invalid if any part of the consideration on either side is unlawful. See Metcalf on Contracts, 216-219. What the mutual promises were is a question of fact. The parties do not appear to have fully expressed in language the precise nature of the various services to be performed by the plaintiff, nor to have made any verbal bargain as to the mode of payment. In such cases it is sometimes said that "the law implies an agreement" as to the matters omitted to be explicitly stated in the verbal bargain. Strictly speaking, this is inaccurate. The agreement, though not fully expressed in words, is, nevertheless, a genuine agreement of the parties; it is "implied" only in this, that it is to be inferred from the acts or conduct of the parties instead of from their spoken words; "the engagement is signified by conduct instead of words." But acts intended to lead to a certain inference may "express a promise as well as words would have done." The term "tacit contract," suggested by Mr. Austin, describes a genuine agreement of this nature better than the phrase "an implied contract"; for the latter expression is sometimes used to designate legal obligations, which, in fact, are not contracts at all, but are considered so only by a legal fiction for the sake of the remedy. See Austin on Jurisprudence (3d ed.), 1018, 946; Am. Law Review, Vol. 5, pp. 11, 12; Metcalf on Contracts, 5, 6, 9, 10, 163, 164; Edinburgh Review, American reprint, Vol. 118, p. 239.

The questions arising in this case—What services did the plaintiff agree to perform? was it an entire contract? were there separate contracts, upon separate considerations, as to the legal and the illegal services?—are all questions of fact depending upon the mutual understanding of the parties; and if the nature of the agreed facts is such as to allow of a finding either way, it would be proper to submit the questions to a jury. In the present case, however, there is room for but one conclusion, namely, that the agreement was that the plaintiff, at the defendants' request, should perform all the services which he did in fact perform, and that the defendants, in consideration of the promise to perform (and the performance of) all those services, the illegal as well as the legal, should pay the plaintiff the reasonable worth of the entire services. In other words, the plaintiff made an entire promise to perform both classes of services; this entire promise

(and the performance thereof) formed an entire consideration for the defendants' promise to pay; and a part of this indivisible consideration was illegal. *Walker v. Lovell* (28 N. H. 138) and *Carleton v. Woods* (28 N. H. 290), cited by the plaintiff, are not in point. In those cases the different articles sold were valued separately in the sale. If the plaintiff had performed a class of services for each of which it is customary to pay a separate price (see, for instance, *Robinson v. Green*, 3 Metcalf, 159), the nature of the various services so performed might afford ground for the conclusion that the parties contemplated a separate payment for each service rendered. But it is not contended that it is customary to pay saloon-tenders separate prices for sweeping, for building fires, for acting as billiard markers, and for selling liquor.

In accordance with the provisions of the agreed case, unless the plaintiff elects trial by jury, there must be

Judgment for the defendants.²⁴

Effect of the intention of the parties when illegal.

TYLER v. CARLISLE.

79 MAINE, 210.—1887.

Assumpsit. Verdict for defendant.

PETERS, C. J. The plaintiff claims to recover a sum of money loaned by him while the defendant was engaged in playing at cards. The ruling, at the trial, was that, if the plaintiff lent the money with an express understanding, intention, and purpose that it was to be used to gamble with, and it was so used, the debt so created cannot be recovered; but otherwise, if the plaintiff had merely knowledge that the money was to be so used. Upon authority and principle the ruling was correct.

Any different doctrine would, in most instances, be impracticable and unjust. It does not follow that a lender has a guilty purpose merely because he knows or believes that the borrower

²⁴ See also *Handy v. St. Paul Globe Co.*, 41 Minn. 188; *Foley v. Speir*, 100 N. Y. 552; *Shaw v. Carpenter*, 54 Vt. 155.

has. There may be a visible line between the motives of the two. If it were not so, men would have great responsibilities for the motives and acts of others. A person may loan money to his friend,—to the man, and not to his purpose. He may at the same time disapprove his purpose. He may not be willing to deny his friend, however much disapproving his acts.

In order to find the lender in fault, he must himself have an intention that the money shall be illegally used. There must be a combination of intention between lender and borrower—a union of purposes. The lender must in some manner be a confederate or participator in the borrower's act, be himself implicated in it. He must loan his money for the express purpose of promoting the illegal design of the borrower; not intend merely to serve or accommodate the man. In support of this view many cases might be adduced. A few prominent ones will suffice. *Green v. Collins*, 3 Cliff. 494; *Gaylord v. Soragen*, 32 Vt. 110; *Hill v. Spear*, 50 N. H. 252; *Peck v. Briggs*, 3 Denio, 107; *M'Intyre v. Parks*, 3 Met. 207; *Bancho v. Mansel*, 47 Maine, 58. (See 68 Maine, p. 47.)

Nor was the branch of the ruling wrong, that plaintiff, even though a participator, could recover his money back, if it had not been actually used for illegal purposes. In the minor offenses, the *locus penitentiae* continues until the money has been actually converted to the illegal use. The law encourages a repudiation of the illegal contract, even by a guilty participator, as long as it remains an executory contract or the illegal purpose has not been put in operation. The lender can cease his own criminal design and reclaim his money. "The reason is," says Wharton, "the plaintiff's claim is not to enforce, but to repudiate, an illegal contract." Whar. Con. § 354, and cases there cited. The object of the law is to protect the public—not the parties. "It best comports with public policy, to arrest the illegal transaction before it is consummated," says the court in *Stacy v. Foss*, 19 Maine, 335. See *White v. Bank*, 22 Pick. 181.

The rule allowing a recovery back does not apply when the lender knows that some infamous crime is to be committed with the means which he furnishes. It applies only where the minor offenses are involved.

Exceptions overruled.²⁵

²⁵ See also *Hull v. Ruggles*, 56 N. Y. 424.

NEW *v.* WALKER.

108 INDIANA, 365.—1886.

Action on a promissory note. Defense, illegality of consideration. Reply, purchase before maturity, for value, and without knowledge of illegality. Demurrer to reply. Demurrer sustained. Plaintiff appeals.

Defendant gave the note in question for the purchase price of a patent right. By the statute, all sales of patent rights are unlawful when the seller has not filed with the clerk of court of the county where the sale is made copies of the letters patent, and an affidavit that the letters are genuine, etc., and all obligations given for the purchase price of such patent rights are required to contain the words "given for a patent right." Non-compliance with the statute is made a misdemeanor. The payee of the note in question had not complied with this statute.

ELLIOTT, C. J. In our opinion, a promissory note executed in direct violation of a mandatory statute, is inoperative as between the parties and those who buy with notice. Where a statute, in imperative terms, forbids the performance of an act, no rights can be acquired by persons who violate the statute, nor by those who know that the act on which they ground their claim was done in violation of law. A promissory note, executed in a transaction forbidden by statute, is at least illegal as between the parties and those who have knowledge that the law was violated. It is an elementary rule that what the law prohibits, under a penalty, is illegal, and it cannot, therefore, be the foundation of a right as between the immediate parties. *Wilson v. Joseph*, 107 Ind. 490; *Hedderich v. State*, 101 Ind. 571, 51 Am. R. 768; *Case v. Johnson*, 91 Ind. 477.

This rule also applies to those who assume to purchase from one of the parties to the transaction, but purchase with full knowledge that the law has been transgressed.

* * * * *

Having determined that the promissory note, on which the action is founded, is negotiable as commercial paper, the next question is, what are the rights of the appellant as the *bona fide* holder of the paper? For there can be no doubt under the confessed allegations of the reply that she is such a holder. She is such in

the strongest light, for she purchased from a good-faith owner, and is herself free from fault and innocent of wrong. *Hereth v. Merchants' Nat. Bank*, 34 Ind. 380; *Newcome v. Dunham*, 27 Ind. 285.

The decisions agree that, where the statute in direct terms declares that a note given in violation of its provisions shall be void, it is so no matter into whose hands it may pass. The rule is thus stated by the court in *Vallett v. Parker* (6 Wend. 615): "Wherever the statute declares notes void, they are and must be so, in the hands of every holder; but where they are adjudged by the court to be so, for failure or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with, or have had notice of the consideration."

It is said by a late writer, in stating the same general rule, that, "when a statute, expressly or by necessary implication, declares the instrument absolutely void, it gathers no vitality by its circulation in respect to the parties executing it." 1 Daniel Negotiable Int. § 197. We regard this author's statement as substantially expressing the general rule, and, accepting it as correct, the pivotal question is whether our statute does expressly, or by necessary implication, declare that notes given to vendors of patent rights who have disobeyed the law shall be void? There is certainly no express declaration in the statute that such notes shall be void, nor do we think that there is any necessary implication that they shall be void. A man may be guilty of a misdemeanor, and yet notes taken by him in the transaction which creates his guilt may not be void in the hands of an innocent holder. A familiar illustration of this principle is afforded by those cases which declare that a note given in consideration of the suppression of a criminal prosecution is inoperative as between the immediate parties, but valid in the hands of a *bona fide* purchaser. This is the settled law, although the compounding of a felony is made a crime by statute. Our opinion is, that a statute making it a crime to take promissory notes in a prohibited transaction does not make the notes void in the hands of innocent purchasers, although the person who violates the statute commits a crime. This conclusion is well sustained by authority. *Anderson v. Etter*, 102 Ind. 115; *Vallett v. Parker*, *supra*; *Taylor v. Beck*, 3 Rand. (Va.) 316; *Glenn v. Farmers' Bank*, 70 N. C. 191; *Smith v. Columbus State Bank*, 9 Neb. 31; *Haskell v. Jones*, 86 Pa. St. 173; *Palmer v. Minar*, 8 Hun, 342; *Cook v. Weirman*, 51 Iowa, 561.

A party who executes a promissory note, negotiable as commercial paper, fair on its face and complete in all its parts, puts in circulation an instrument which he knows is the subject of barter and sale in the commercial world, and it is his own fault if he does not put into it the words which will warn others not to buy it in the belief that it will be free from all defenses. The experience of the business world has shown the necessity of affixing to promissory notes the quality of negotiability, and commercial transactions would be seriously disturbed if notes, fair on their face, and containing the required words of negotiability, were not protected in the hands of innocent purchasers. It is, therefore, not the policy of the law to multiply exceptions to the general rules governing notes negotiable by the law merchant, so that in such a case as this it cannot, without an indefensible departure from that policy, be held that the promissory note is not protected in the hands of a good-faith holder.

Nor can such a step be taken without wandering from the course marked and defined by the long-established principle that, where one of two innocent persons must suffer from the act of a third person, he who puts it in the power of the third to do the act must bear the loss. To our minds it seems clear that this principle rules here, for the man who executes to a vendor of patent rights a promissory note, in full and perfect form, puts it in his power to wrong others by selling the note as an article of commerce.

We regard the reply as unquestionably good, and adjudge that the trial court erred in sustaining the demurrer to it.

* * * * *

Judgment reversed.²⁰

Relief from a contract which is known to be illegal.

DUVAL *v.* WELLMAN.

124 NEW YORK, 156.—1891.

Appeal from order of the General Term of the Court of Common Pleas for the city of New York, made May 4, 1888, which re-

²⁰ See also *Glenn v. Farmers' Bank*, 70 N. C. 191; *Singleton v. Brenar*, Harper (So. Car.), 201; *Coulter v. Robertson*, 14 Smedes & Marshall (Miss.), 18; *Traders' Bank v. Alsop*, 64 Ia. 97. See on usury contracts, *Kendall v. Robertson*, 12 Cush. (Mass.) 156; *Wortendyke v. Meehan*, 9 Neb. 221.

versed an order of the General Term of the City Court, which reversed an order of the Special Term of said court denying a motion for a new trial.

This action was brought to recover back moneys paid by plaintiff's assignor to defendant upon contracts set forth in the opinion, in which the material facts are also stated.

BROWN, J. The record before us does not contain the pleadings, and we are not informed of the grounds upon which the plaintiff therein based his right to recover. The case has, however, been disposed of in defendant's favor in the court below on the ground that the contract between the parties, upon which the money was paid, was illegal, and that the plaintiff's assignor was *particeps criminis*, and equal in guilt with the defendant. But whether the cause of action was based upon the contract, or upon the illegality of the contract, and in disaffirmance thereof, does not appear. The questions discussed in the lower courts have, however, been regarded as of sufficient importance to receive the consideration of this court, and as they were the only ones discussed at our bar, we may confine our observations to them without regard to the particular issue made by the pleadings.

It appears from the evidence that the plaintiff is the assignee of Mrs. E. Guion, a widow lady, who, in her search for a husband, sought the advice and aid of the defendant, who was the owner and publisher of a matrimonial journal called "The New York Cupid," and the proprietor of a matrimonial bureau in New York City. Mrs. Guion's testimony was to the effect that in June, 1886, she became a patron of the defendant's establishment, and paid the usual registration fee of five dollars; that she was introduced to thirty or forty gentlemen, but found none whom she was willing to accept as a husband; and that in June, 1887, for the purpose of stimulating the defendant's efforts in her behalf, she paid him fifty dollars, whereupon there was executed the following instrument:

"June 2d, 1887.

"Due Mrs. Guion from Mr. Wellman fifty dollars (\$50.00), Aug. 15th, if at that time she is willing to give up all acquaintance with gentlemen who were introduced in any manner by H. B. Wellman. If Mrs. Guion marry the gentleman whom we introduce her to, an additional fifty dollars (\$50.00) is due Mr. Wellman from Mrs. Guion.

"(Signed)

H. B. WELLMAN.

"E. GUION."

In August, 1887, Mrs. Guion, not finding a congenial companion among any of the men to whom she had been introduced, and claiming to be willing to give up all acquaintance with them, demanded from defendant the return of the money paid, which, being refused, the claim was assigned to plaintiff and this action was commenced.

The five learned judges who have delivered opinions in the case have agreed that the contract between the parties was void, and this conclusion appears to be amply supported by authority. 1 Story's Eq. Jurisprudence, §§ 260-264; 2 Pomeroy's Eq. Jurisprudence, § 931; Willard's Eq. Jurisprudence, 211; Bacon's Abridgment, title Marriage & Divorce, D.; Fonblanque's Eq. ch. 1, § 10; *Boynton v. Hubbard*, 7 Mass. 112; *Crawford v. Russell*, 62 Barb. 92.

Judge Story, after discussing the grounds upon which courts of equity interfere in cases of this kind, says: "It is now firmly established that all such contracts are utterly void as against public policy . . .", and Chief Justice Parsons said, in *Boynton v. Hubbard*, *supra*, that "these contracts are void . . . because they have a tendency to cause matrimony to be contracted on mistaken principles and without the advice of friends, and they are relieved against as a general mischief for the sake of the public."

The doctrine that marriage brokerage contracts are void is the outgrowth of the views and opinions of the English people upon the subject of the marriage relation, and the courts of England, for upwards of a century, have universally declared that the natural consequences of such agreements would be to bring about ill-advised, and, in many instances, fraudulent marriages, resulting inevitably in the destruction of the hopes and fortunes of the weaker party, and especially of women, and that every temptation in the exercise of undue influence in procuring a marriage should, therefore, be suppressed.

The defendant has, however, succeeded in the lower court upon the application of the rule that a court will not lend its aid to either of the parties to an illegal or fraudulent contract, either by enforcing its execution if it be executory, or by rescinding it if it be executed. Public policy has dictated the adoption of this rule, but it has its limitations, and when the parties are not equally guilty, or when the public interest is advanced by allowing the more excusable of the two to sue for relief, the courts will aid the injured party by setting aside the contract and restoring him,

so far as possible, to his original position. 1 Pomeroy's Equity, § 403; 1 Story's Equity, § 300.

It is not sufficient for the defendant to show merely that the other contracting party is *particeps criminis*, but it must appear that both are equal in guilt unless the contract be *malum in se*, in which case the maxim *ex dolo malo non oritur actio* is of universal application.

This subject received very full consideration in the case of *Tracy v. Talmage* (14 N. Y. 162), and it was there said that unless the parties are *in pari delicto* as well as *particeps criminis*, the courts, although the contract is illegal, will afford relief to the more innocent party.

Upon the application of this doctrine, in *Mount v. Waite* (7 Johns. Rep. 433), premiums paid for the insurance of lottery tickets were recovered, the plaintiff being held not to be equal in guilt with the defendants.

In *Wheaton v. Hibbard* (20 Johns. Rep. 290) it was held that usurious interest paid by a borrower could be recovered independent of the statute, and that the maxim *inter partes in pari delicto, potior est conditio defendentis* did not apply, as the law considered the borrower the victim of the usurer, and Lord Mansfield laid down the rule that in transactions prohibited by statute for the protection of one set of men from another set of men the parties are not *in pari delicto*. *Browning v. Morris*, 2 Cowp. 790. See also *Schroepfel v. Corning*, 6 N. Y. 107, 115, 116.

It will appear from an examination of the authorities upon this subject, a very few only of which are cited, that courts, both of law and equity, have held that two parties may concur in an illegal act without being deemed in all respects *in pari delicto*. In many such cases relief from the contract will be afforded to the least guilty party when he appears to have acted under circumstances of imposition, hardship, or undue influence, and especially where there is a necessity of supporting public interests, or a well-settled policy of the law, whether that policy be declared in the statutes of the State or be the outgrowth of the decisions of the courts. Accordingly, many cases may be cited where relief has been granted from contracts which partook of the character of marriage brokerage agreements. The cases are collected in Pomeroy's Equity Jurisprudence, in a note to section 931; in Fonblanque's Eq. (B. I., ch. 4, §§ 10, 11), and Bacon's Abridgement, title Marg. & Divrs. (541 *et seq.*), and need not be cited here. In

two of the cases referred to, money paid under the contract was recovered back. *Smith v. Bruning*, 2 Vern. 392; *Goldsmith v. Bruning*, 1 Eq. Cases Abr. 89.

The question in this and kindred cases, therefore, must always be whether the parties are equal in guilt. Obviously cases might arise where this would clearly appear and where the court would be justified in so holding as a matter of law, as where there was an agreement between two, having for its purpose the marriage of one to a third party, the parties would be so clearly *in pari delicto* that the courts would not aid the one who had paid money to the other in the promotion of the common purpose, to recover it back. Such a case would partake of the character of a conspiracy to defraud. So if two parties entered into a partnership to carry on such a business as defendant conducted, the courts would not lend their aid to either to enforce the agreement between them.

But where a party carries on a business of promoting marriage as the defendant appears to have done, it is plain to be seen that the natural tendency of such a business is immoral, and it would be so clearly the policy of the law to suppress it, and public interest would be so greatly promoted by its suppression, that there would be no hesitation upon the part of the courts to aid the party who had patronized such a business by relieving him or her from all contracts made, and grant restitution of any money paid or property transferred. In that way only could the policy of the law be enforced and public interest promoted.

Contracts of this sort are considered as fraudulent in their character and parties who pay money for the purpose of procuring a husband or wife will be regarded as under a species of imposition or undue influence. The subject is classed by all text writers under the head of constructive or implied fraud, and it is upon the application of rules which belong to that branch of the law that the cases have been decided to which I have referred.

We are of the opinion, therefore, that it was error to hold as a legal conclusion that the parties to the contract in question were equal in guilt.

The learned General Term of the Common Pleas appeared to have considered that the voluntary character of Mrs. Guion's acts was decisive of this question and deprived her of the right of recovery. It is true there is no evidence of actual over-persuasion or undue influence. But at most the inferences to be drawn from these facts were for the jury. The prominent fact in the case

is that such a place as the defendant maintained existed in the community, with its evil surroundings and immoral tendencies. What influence was exerted upon the mind of the widow by the mere fact of the existence of such a place to which resort could be had, cannot of course appear except by inference. But if the evidence was not sufficiently strong to authorize the court to hold as a question of law that the parties were not *in pari delicto*, it at least presented a question of mixed fact and law for the jury.

Our opinion is that the same reasons that have induced courts to declare contracts for the promotion of marriage void, dictate with equal force that they should be set aside and the parties restored to their original position. To decide that money could not be recovered back would be to establish the rules by which the defendant and others of the same ilk could ply their trade and secure themselves in the fruits of their illegal transactions.

We are of the opinion, therefore, that the Common Pleas erred in reversing the order of the City Court, and that a new trial should have been granted.

The order appealed from should be reversed, and the order of the General Term of the City Court affirmed, with costs.

All concur. Order reversed.

ENGINEERING CASES: EXCERPTS FROM DECISIONS.

LEGALITY.

In order to render a contract void because it was made on Sunday, it must have been closed or completed on that day. *Foster v. Worton*, 67 Miss. 540.

A contract cannot be delivered on Sunday to an agent for delivery on a week-day. *Davis v. Barger*, 57 Ind. 54.

A sewer contractor was held not liable for negligence for refusing to work on Sunday when by so doing he could have prevented injury to a brick wall. *Oleson v. City of Plattsmouth* (Neb.), 52 N. W. Rep. 848.

In a contract for services, an agreement by the employee to give his whole time to the work, Sundays and holidays not excepted, is

a valid one; he may be required to work Sundays and may be discharged for not doing so. *Nelson v. Pyramid H. P. Co.* (Wash.), 30 Pac. Rep. 1096.

A contract made by a person whose property is in danger from a mob to reimburse the sheriff for the wages and subsistence of special deputies is not void as against public policy. *McCandless v. Allegheny Bessemer Steel Co.* (Pa.), 25 Atl. Rep. 579.

LAWFUL SUBJECT-MATTER.

A promise by owners of a building to rent it at a nominal sum to the government as a postoffice and to use their personal influence to have the postoffice located in that building was held to be illegal and against public policy, and the contract was void. *Elkart Co. Lodge v. Crary*, 98 Ind. 238 (1884).

It is against public policy for a public officer to agree to accept a larger or smaller fee than is prescribed by law, to delegate his official duty, or to appoint a certain individual as deputy in case he is elected. *Deyoe v. Woodworth* (N. Y. App.), 24 N. Y. S. 373; *Conner v. Canter* (Ind. App.), 44 N. E. Rep. 656.

Contracts made with a view to gaining public favor with the government or public officials, such as to pay officers for their influence in procuring contracts for work, or to have a certain bid accepted, are against public policy. *Davidson v. Seymour*, 1 Bosw. (N. Y.) 88; *Bermudez Asph. Pav. Co. v. Critchfield*, 62 Ill. App. 221.

While a contract to secure private influence in getting desired legislation is void, a contract to draft a bill, to explain it to legislators and to request its introduction is not void as against public policy. *Burney's Heirs v. Ludeling* (La.), 16 So. Rep. 507; *Chesebrough v. Conover* (N. Y. App.), 21 N. Y. S. 566.

No recovery could be had under a contract to grade a street for fill placed outside the street line and on private property, as it was an unlawful act without the consent of the owner. *Davies v. E. Saginaw* (Mich.) 32 N. W. Rep. 919 (1887).

Where a part of a street improvement encroached on private property the contractor was not prevented thereby from recovering for work done on the street. *Johnson v. Duer* (Mo.), 21 S. W. Rep. 800.

Though the contract was void, recovery was allowed a contractor who built a railroad bridge and track outside the railroad company's property, because the company had possession and bene-

fit of the structure. *Cunningham v. Massena Springs R. Co.* (Sup.), 18 N. Y. Supp. 600.

Contracts which are in violation of city ordinances are not binding, such as those to erect structures violating the prescribed thickness of walls. *Stevens v. Gourley*, 7 C. B. N. S. 99.

An agreement between members of trade unions to maintain uniform rates of charges for work and to prevent competition is illegal; one party cannot maintain an action against another who has underbid him. *Moore v. Bennett* (Ill.), 29 N. E. Rep. 888.

A contract by which one person agrees not to sue another for damages for injuries due to the other's negligence is against public policy and void. *Porter v. N. Y. L. E. & W. R. Co.*, 129 N. Y. 624 (1891).

An agreement between a railroad company and an employee that an officer of the company shall be the sole judge of damages to be assessed for breach of the company's rules is against public policy.

Reference.

CHAPTER III.

THE CONTRACT: PARTIES AFFECTED.

The study of the rules of contract now naturally leads to the parties affected, that is, the persons who have rights and liabilities under the agreement. There are two general rules which apply to this phase of the subject:

(a) Only the parties to the contract can be bound by it or receive benefits under it.

(b) Under some conditions the liabilities and benefits of the contract may be transferred to some person or persons other than the original parties. This may be effected by the parties themselves or by the operation of a rule of law.

The first rule—that a person who is not a party to a contract cannot be bound by it, cannot sue or be sued upon it—is one of the fundamental conceptions of the theory of contract. Thus, if A promises B to do some act for C's benefit, C's relations are not affected by the agreement. He was not a party and a breach of the agreement cannot bind him.

SECTION I.

THIRD PARTIES.

1. A person cannot make himself liable on a contract to which he is not a party. To illustrate, a man cannot pay another's debt without his consent and thereby convert himself into a creditor.¹

2. The duty to respect the contractual tie rests upon all persons; hence if a man induces one of two contracting parties to break a contract, with the intent to injure the other party or to derive a benefit for himself, that man does the other an actionable wrong.²

¹ *South Scituate v. Hanover*, 9 Gray (Mass.) 420.

² *Angle v. Chicago etc. Ry.*, 151 U. S. 1, 13-15; *Walker v. Cronin*, 107 Mass. 555; *Bixby v. Dunlap*, 56 N. H. 456; *Jones v. Stanly*, 76 N. C. 355. But some authorities hold that aside from the case of master and servant under the statutes, there is no action for inducing breach of contract unless unlawful means are used, as threats, violence or fraudulent misrepresenta-

(a) *English Rule.*

A person cannot obtain rights derived from a contract to which he is not a party.

(b) *Massachusetts Rule.*

The later Massachusetts cases practically adopt the English rule that no action is maintainable by one for whose benefit a promise is made.³

(c) *New York Rule.*

A third person, X, for whose benefit a promise is made by A, upon a consideration moving from B, the promisee, may maintain an action upon the promise, provided he was the person directly intended to be benefited, and provided the promise was, at the time the promise was given, under an existing obligation or duty to X which he is seeking to discharge by giving X the benefit of A's promise.⁴

tions, so that the breach is involuntary on the part of the one committing it; and that it is not sufficient to show that the defendant acted maliciously. *Bourlier Bros. v. Macauley*, 91 Ky. 135; *Ashley v. Dixon*, 48 N. Y. 430.

³ *Exchange v. Rice*, 107 Mass. 37; *Marston v. Bigelow*, 150 Mass. 45; *Borden v. Boardman*, 157 Mass. 410. So also Michigan. *Linneman v. Boross*, 98 Mich. 178.

⁴ *Lawrence v. Fox*, 20 N. Y. 268; *Frooman v. Turner*, 69 N. Y. 280. This rule with the first limitation has been generally adopted throughout the United States. It is almost universally held that if the benefit is only incidental the third person cannot maintain an action. *Burton v. Larkin*, 36 Kan. 246; *Howsmon v. Trenton Water Co.*, 119 Mo. 304; *National Bank v. Grand Lodge*, 98 U. S. 123. Perhaps the only case to the contrary is *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340. The second limitation has also been expressly approved. *Jefferson v. Asch*, 53 Minn. 446. But many cases state the rule in the broadest possible terms without reference to this limitation. *Grant v. Diebold Safe & Lock Co.*, 77 Wis. 72; *Hendrick v. Lindsay*, 93 U. S. 143, 149. It is believed, however, that with few exceptions the decided cases which apply the rule apply it to the facts well within the second limitation. The following are illustrative of its application: a promise by A to pay B's creditor (X) in place of paying B himself, *Lawrence v. Fox*, *supra*; *Wood v. Moriarty*, 15 R. I. 518; a promise by an incoming partner (A) to pay the creditors (X, Y, etc.) of the firm of which the promisee (B) is an outgoing partner; *Lehow v. Simonton*, 3 Colo. 346; *Claflin v. Ostrom*, 54 N. Y. 581; *Shamp v. Meyer*, 20 Neb. 223; a promise by a purchaser or grantee of property to pay a mortgage or lien against the property for which the seller or grantor was personally liable; *Burr v. Beers*, 24 N. Y. 178; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Hallenbeck v. Kindred*, 109 N. Y. 620; *Dean v. Walker*, 107 Ill. 540; but not where the grantor was not personally liable:

Statute of Frauds.

It is generally held that the promise does not fall within the Statute of Frauds, since it is given to the debtor and not to the creditor.⁵

Sealed Instruments.

It is also generally held that the case escapes the technical rule that only the parties to a sealed instrument can sue or be sued upon it, since the promise actually declared upon is one created by law.⁶

Right of Promisee to Release Promisor.

If the third party has accepted or acted upon the promise, the promisee cannot afterward release the promisor from it,⁷ but he may release him at any time before the third party accepts or acts upon the promise.⁸

Effect Upon Promisee's Liability.

If the third party elects to avail himself of the promise, he thereby releases the promisee from further liability and must look to the promisor alone.⁹

CASES.

CHAPTER III.—PARTIES AFFECTED.

SECTION I.—THIRD PARTIES.

The position of a third party incurring liabilities.WALKER *et al.* v. CRONIN.

107 MASSACHUSETTS, 555.—1871.

Tort. Demurrer to declaration sustained. Plaintiffs appeal.

WELLS, J. The second and third counts recite contracts of the plaintiffs with their workmen for the performance of certain work

Frooman v. Turner, *supra*; *Durnherr v. Rau*, 135 N. Y. 219; *cf. Keller v. Ashford*, 133 U. S. 610; a promise made to a father for the benefit of a minor child: *Gooden v. Rayl*, 85 Iowa 592; *Strong v. Marcy*, 33 Kans. 109.

⁵ *Wood v. Moriarty*, 15 R. I. 518. Contra: *Clapp v. Lawton*, 31 Conn. 95.

⁶ *Bassett v. Hughes*, 53 Wis. 319; *Hughes v. Oregon Ry. & Nav. Co.*, 11 Ore. 437.

⁷ *Gifford v. Corrigan*, 117 N. Y. 257; *Bassett v. Hughes*, *supra*.

⁸ *Trimble v. Strother*, 25 Ohio St. 378.

⁹ *Bohanan v. Pope*, 42 Me. 93; *Wood v. Moriarty*, *supra*.

in the manufacture of boots and shoes; and allege that the defendant, well knowing thereof, with the unlawful purpose of hindering and preventing the plaintiffs from carrying on their business, induced said persons to refuse and neglect to perform their contracts, whereby the plaintiffs suffered great damage in their business.

It is a familiar and well-established doctrine of the law upon the relation of master and servant, that one who entices away a servant, or induces him to leave his master, may be held liable in damages therefor, provided there exists a valid contract for continued service, known to the defendant. It has sometimes been supposed that this doctrine sprang from the English statute of laborers, and was confined to menial service. But we are satisfied that it is founded upon the legal right derived from the contract, and not merely upon the relation of master and servant; and that it applies to all contracts of employment, if not to contracts of every description.

In *Hart v. Aldridge* (Cowp. 54) it was applied to a case very much like the present.

In *Gunter v. Astor* (4 J. B. Moore, 12) it was applied to the enticing away of workmen not hired for a limited or constant period, but who worked by the piece for a piano manufacturer.

In *Shepherd v. Wakeman* (Sid. 79) it was applied to the loss of a contract of marriage by reason of a false and malicious letter claiming a previous engagement.

In *Winsmore v. Greenbank* (Wiles, 577) the defendant was held liable in damages for unlawfully and unjustly "procuring, enticing, and persuading" the plaintiff's wife to remain away from him, whereby he lost the comfort and society of his wife, and the profit and advantage of her fortune.

In *Lumley v. Gye* (2 El. & Bl. 216) the plaintiff had engaged Miss Wagner to sing in his opera, and the defendant knowingly induced her to break her contract and refuse to sing. It was objected that the action would not lie, because her contract was merely executory, and she had never actually entered into the service of the plaintiff; and Coleridge, J., dissented, insisting that the only foundation for such an action was the statute of laborers, which did not apply to service of that character; but after full discussion and deliberation it was held that the action would lie for the damages thus caused by the defendant.

In *Boston Glass Manufactory v. Binney* (4 Pick. 425), which

was for inducing workmen, skilled in several departments of glass-making, to leave the employment of the plaintiff, it was not suggested that the defendants would not have been liable if there had been an existing contract between the plaintiff and the workmen.

Upon careful consideration of the authorities, as well as of the principles involved, we are of opinion that a legal cause of action is sufficiently stated in each of the three counts of the declaration.

Demurrer overruled.¹⁰

JONES v. STANLY.

76 NORTH CAROLINA, 355.—1877.

Action for damages. Judgment for plaintiff, which was arrested by trial court. Plaintiff appeals.

RODMAN, J. It was decided in *Haskins v. Royster* (70 N. C. 601) that if a person maliciously entices laborers or croppers to break their contracts with their employer and desert his service, the employer may recover damages against such person. The

¹⁰ INDUCING WORKMEN TO QUIT EMPLOYMENT.—The general rule in the United States is in accordance with the English authorities and the above case. In *Old Dominion S. S. Co. v. McKenna* (30 Fed. Rep. 48; S. C. Burdick's Cases on Torts, 195) the court, Brown, J., said: "The defendants not being in the plaintiff's employ, and without any legal justification so far as appears,—a mere dispute about wages, the merits of which are not stated, not being any legal justification,—procured plaintiff's workmen in this city and in Southern ports to quit work in a body, for the purpose of inflicting injury and damage upon the plaintiff until it should accede to the defendants' demands, and pay the Southern negroes the same wages as New York longshoremen, which the plaintiff was under no obligation to grant; and such procurement of workmen to quit work, being designed to inflict injury on the plaintiff, and not being justified, constituted in law a malicious and illegal interference with the plaintiff's business, which is actionable." In *Toledo &c. Ry. Co. v. Pennsylvania Co. et al.* (54 Fed. Rep. 730) the court granted a temporary injunction, pending the action, against the Chief of the Brotherhood of Locomotive Engineers, restraining him from issuing or continuing in force any rule or order of the Brotherhood ordering engineers not to handle the cars of the complainant company. Taft, Circuit Judge (p. 744, says: "The many engineers who serve the defendant companies will refuse to handle the complainant's freight. The defendant companies will probably be coerced thereby to refuse complainant's freight. . . . The injury will be irreparable, and a judgment for damages at law

same reasons cover every case where one person maliciously persuades another to break *any* contract with a third person. It is not confined to contracts for service. In the present case the plaintiff made a contract with the Atlantic & North Carolina Railroad Company, of which the defendant was President and Superintendent, by which the company agreed to transport from points on their road to Morehead City a large number of crossties which plaintiff had contracted to deliver in Cuba. After the contract had been partly performed the defendant, being still President and Superintendent of the company, maliciously and for the purpose of injuring the plaintiff, as the jury have found, refused to complete the contract, whereby plaintiff was injured. After the jury had found a verdict for the plaintiff and assessed his damages the judge arrested the judgment, and the plaintiff appealed. In this we think the judge erred and his judgment must be reversed.

It is the duty of this court to give such judgment as it appears on the record that the court below should have given. The plaintiff moves here for judgment upon the verdict. There are no exceptions by defendant to the judge's charge, and it does not appear that he asked for a new trial. The instructions of the judge on the question of damages are not full, but it does not appear that he was requested to give any others. If he had thought the dam-

will be wholly inadequate. The authorities leave no doubt that in such a case an injunction will issue against a stranger who thus intermeddles, and harasses complainant's business. . . . It would seem from the foregoing authorities that we may enjoin Arthur from directing the engineers to quit work, for the purpose of coercing the defendant companies to violate the law and the complainant's rights. Though we cannot enjoin the engineers from unlawfully quitting, it does not follow that we may not enjoin Arthur from ordering them to do so." In *Webber v. Barry* (66 Mich. 127) it was held that one who enters the premises of another "for the purpose of inducing persons in the employ of that other to leave their employment to the injury of the employer, for the purpose of getting higher wages, or working less hours for the same pay, or for any other reason," is a trespasser. See, for different phases of the general doctrine, *Biaby v. Dunlap*, 56 N. H. 456; *Haskins v. Royster*, 70 N. C. 601; *Dickson v. Dickson*, 33 La. Ann. 1261. That a workman has an action against one who maliciously induces his employer to discharge him, see *Chipley v. Atkinson*, 23 Fla. 206.

INDUCING BREACH OF CONTRACT OF SERVICE OTHER THAN MANUAL.—In the case of *Bourlier Brothers v. Macauley* (91 Ky. 135) it was held not actionable for defendant to induce an actress to break her contract to perform at plaintiff's theatre and to enter into a contract to perform at defendant's rival theatre. The court expressly declined to follow *Lumley v. Gye*, and approved the dissenting opinion of Coleridge, J., in that case.

ages excessive, he would have set the verdict aside and given a new trial on that ground. We neither do nor can know anything of the evidence, and if we did we could not set aside the verdict and give a new trial on that ground, except perhaps where it appeared to be a very gross case of excess.

Judgment below reversed and a judgment in this court for the plaintiff according to the verdict.

Judgment reversed.¹¹

The position of a third party acquiring rights where a promise has been made for his benefit.

LEHOW *v.* SIMONTON *et al.*

3 COLORADO, 346.—1877.

Assumpsit. Plea of set-off. A demurrer to the plea was sustained.

The plea set forth that the plaintiff, Pierce, had purchased the interest of one Phifer in the business of Simonton & Phifer, and had agreed to assume one-half of the indebtedness of the firm jointly with the plaintiff, Simonton; that Simonton & Phifer were then indebted to defendant in the sum of \$2,000; and that Pierce jointly with Simonton, plaintiffs herein, undertook and agreed with the old firm to pay this amount to defendant.

WELLS, J. 1. Whatever may be the general rule in the case of a plea, it is certain that the declaration in counting upon a promise good in parol by the common law need not show a com-

¹¹ Accord: *Rice v. Manley*, 66 N. Y. 82, where the contract was unenforceable under the statute of frauds, but would have been performed had not the defendant interfered.

Contra: *Chambers v. Baldwin*, 91 Ky. 121; *Boyson v. Thorn*, 98 Cal. 578. These cases hold that an action can be maintained only when the defendant employs some unlawful means, as threats, violence, falsehood, or deception, to induce the breach of the contract, and that it is not enough to show that the defendant acted maliciously. In *Chambers v. Baldwin* (pp. 126-7) Lewis, J., says: "Cooley on Torts, 497, agreeing with Justice Coleridge, says: 'An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff, the consequence after all being only a broken contract, for which the party to the contract may have his remedy by suing upon it.' And it seems to us that rule harmonizes

pliance with the requisites of the statute of frauds. The statute prescribes a rule of evidence, and not a rule of pleading. Steph. Pl. 313, 374; Brown on Stat. of Frauds, § 505; 1 Chit. Pl. (16th Am. ed.) 245. Now the plea of set-off is in the nature of a declaration, and in respect to the decree of certainty required is governed by the same rule. Waterman on Set-off, § 646. The question, whether the undertaking mentioned in the plea is within the statute of frauds, does not arise.

2. It seems to be the settled doctrine of the courts of England at this day, that a stranger to the consideration cannot enforce the contract by an action thereon in his own name, though he be avowedly the party intended to be benefited. 1 Chit. on Cont. (11th Am. ed.) 74. In this country there are many cases which assert the same rule. *Salmon v. Brown*, 6 Blackf. 347; *Britzell v. Fryberger*, 2 Cart. 176; *Clapp v. Lawton*, 31 Conn. 103; *Conklin v. Smith*, 7 Ind. 108; *Mellen v. Whipple*, 1 Gray, 321; *Robertson v. Reed*, 47 Penn. St. 115; *Exchange Bank v. Price*, 107 Mass. 42; *Warren v. Bachelder*, 15 N. H. 129; *McLaren v. Hutchison*, 18 Cal. 81, and some others which are not accessible to us.

But as respects simple contracts, the decided preponderance of American authority sustains the action of the beneficiary. 1 Pars. on Cont. 467; 1 Chit. Pl. (16th Am. ed.) 5 n. (n. 1); 2 Greenl. Ev. 109; *Thorp v. The Keokuk Coal Co.*, 48 N. Y. 253; *McDowell v. Laev*, 35 Wis. 115; *Bowhannan v. Pope*, 42 Me. 93; *Joslin v. N. J. Car Spring Co.*, 36 N. J. L. 141; *Myer v. Lowell*, 44 Mo. 328; *Sanders v. Clason*, 13 Minn. 379; *Thompson v. Gordon*, 3 Strobb. (S. C.) 196; *Scott's Adm'r v. Gill*, 19 Iowa, 187; *Allen v. Thomas*, 3 Metc. (Ky.) 198; *Draughan v. Bunting*, 9 Ired. 10; *Hendrick v. Lindsay*, 3 Otto, 143; *Beasley v. Webster*, 64 Ill. 458;

with both principle and policy, and to it there can be safely and consistently made but two classes of exceptions; for, as to make a contract binding, the parties must be competent to contract and do so freely, the natural and reasonable presumption is, that each party enters into it with his eyes open, and purpose and expectation of looking alone to the other for redress in case of breach by him. One such exception was made by the English statute of laborers to apply where apprentices, menial servants, and others whose sole means of living was by manual labor, were enticed to leave their employment, and may be applied in this state in virtue of and as regulated by our own statutes. The other arises where a person has been procured against his will or contrary to his purpose, by coercion or deception of another, to break his contract. *Green v. Button*, 2 Crompt. M. & R. 707; *Ashley v. Dixon*, 48 N. Y. 430."

In re Rice, 9 Bankr. Reg. 375; *Bagaley v. Waters*, 7 Ohio St. 369, and many others in the reports of the same courts, are to this effect. To harmonize the decisions is impossible. The doctrine of those last quoted, while confessedly an anomaly, seems to us the more convenient. It accords the remedy to the party who in most instances is chiefly interested to enforce the promise, and avoids multiplicity of actions. That it should occasion injustice to either party seems to us impossible.

3. The plea fails to show to whom the promises relied upon were made; but this is equivalent to stating promise to the party from whom the consideration proceeded. 1 Chit. Pl. (16th ed.) 309 (*k.*); and according to *Delaware and Hudson Canal Co. v. Westchester Bank* (4 Denio, 97), this is the proper form of the averment.

Judgment reversed with costs, and cause remanded. Reversed.¹²

LAWRENCE v. FOX.

20 NEW YORK, 268.—1859.

Appeal from the Superior Court of the city of Buffalo. On the trial before Mr. Justice Masten, it appeared by the evidence of a bystander, that one Holly, in November, 1857, at the request of the defendant, loaned and advanced to him \$300, stating at the time that he owed that sum to the plaintiff for money borrowed of him, and had agreed to pay it to him the then next day; that the defendant, in consideration thereof, at the time of receiving the money, promised to pay it to the plaintiff the then next day. Upon this state of facts the defendant moved for a nonsuit, upon

¹² "It is also argued, as Mansfield's name does not appear in the letters of Hendrick, that he could not join in this action. This would be true, if the promise were under seal, requiring an action of debt or covenant; but the right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country."—Mr. Justice Davis, in *Hendrick v. Lindsay*, 93 U. S. 143, 149.

Accord: *Dean v. Walker*, 107 Ill. 540; *Worley v. Sipe*, 111 Ind. 238; *Burton v. Larkin*, 36 Kans. 246; *Coates v. Penn. Ins. Co.*, 58 Md. 172; *Rogers v. Gosnell*, 58 Mo. 589; *Shamp v. Meyer*, 20 Neb. 223; *Trimble v. Strother*, 25 Ohio St. 378.

three several grounds, viz.: That there was no proof tending to show that Holly was indebted to the plaintiff; that the agreement by the defendant with Holly to pay the plaintiff was void for want of consideration, and that there was no privity between the plaintiff and defendant. The court overruled the motion, and the counsel for the defendant excepted. The cause was then submitted to the jury, and they found a verdict for the plaintiff for the amount of the loan and interest, \$344.66, upon which judgment was entered; from which the defendant appealed to the Superior Court, at General Term, where the judgment was affirmed, and the defendant appealed to this court. The cause was submitted on printed arguments.

H. GRAY, J. The first objection raised on the trial amounts to this: That the evidence of the person present, who heard the declarations of Holly giving directions as to the payment of the money he was then advancing to the defendant, was mere hearsay and therefore not competent. Had the plaintiff sued Holly for this sum of money, no objection to the competency of this evidence would have been thought of; and if the defendant had performed his promise by paying the sum loaned to him to the plaintiff, and Holly had afterwards sued him for its recovery, and this evidence had been offered by the defendant, it would doubtless have been received without an objection from any source. All the defendant had the right to demand in this case was evidence which, as between Holly and the plaintiff, was competent to establish the relation between them of debtor and creditor. For that purpose the evidence was clearly competent; it covered the whole ground and warranted the verdict of the jury.

But it is claimed that, notwithstanding this promise was established by competent evidence, it was void for the want of consideration. It is now more than a quarter of a century since it was settled by the Supreme Court of this State—in an able and painstaking opinion by the late Chief Justice Savage, in which the authorities were fully examined and carefully analyzed—that a promise in all material respects like the one under consideration was valid; and the judgment of that court was unanimously affirmed by the court for the correction of errors. *Farley v. Cleveland*, 4 Cow. 432; same case in error, 9 Id. 639. In that case one Moon owed Farley and sold to Cleveland a quantity of hay, in consideration of which Cleveland promised to pay Moon's debt to

Farley; and the decision in favor of Farley's right to recover was placed upon the ground that the hay received by Cleveland from Moon was a valid consideration for Cleveland's promise to pay Farley, and that the subsisting liability of Moon to pay Farley was no objection to the recovery. The fact that the money advanced by Holly to the defendant was a loan to him for a day, and that it thereby became the property of the defendant, seemed to impress the defendant's counsel with the idea that because the defendant's promise was not a trust fund placed by the plaintiff in the defendant's hands, out of which he was to realize money as from the sale of a chattel or the collection of a debt, the promise, although made for the benefit of the plaintiff, could not inure to his benefit. The hay which Moon delivered to Cleveland was not to be paid to Farley, but the debt incurred by Cleveland for the purchase of the hay, like the debt incurred by the defendant for money borrowed, was what was to be paid. That case has been often referred to by the courts of this State, and has never been doubted as sound authority for the principle upheld by it. *Barker v. Bucklin*, 2 Denio, 45; *Hudson Canal Company v. The Westchester Bank*, 4 Id. 97. It puts to rest the objection that the defendant's promise was void for want of consideration. The report of that case shows that the promise was not only made to Moon but to the plaintiff Farley. In this case the promise was made to Holly and not expressly to the plaintiff; and this difference between the two cases presents the question, raised by the defendant's objection, as to the want of privity between the plaintiff and defendant.

As early as 1806 it was announced by the Supreme Court of this State, upon what was then regarded as the settled law of England, "that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." *Schemerhorn v. Vanderheyden* (1 John. R. 140) has often been reasserted by our courts and never departed from. The case of *Seaman v. White* has occasionally been referred to (but not by the courts), not only as having some bearing upon the question now under consideration, but as involving in doubt the soundness of the proposition stated in *Schemerhorn v. Vanderheyden*. In that case one Hill, on the 17th of August, 1835, made his note and procured it to be indorsed by Seaman and discounted by the Phœnix Bank. Before the note matured and while it was owned by the Phœnix Bank, Hill placed in the hands of the defendant, Whitney, his draft accepted by a third party, which the defendant in-

dorsed, and on the 7th of October, 1835, got discounted and placed the avails in the hands of an agent with which to take up Hill's note; the note became due, Whitney withdrew the avails of the draft from the hands of his agent and appropriated it to a debt due him from Hill, and Seaman paid the note indorsed by him and brought his suit against Whitney. Upon this state of facts appearing, it was held that Seaman could not recover: first, for the reason that no promise had been made by Whitney to pay, and second, if a promise could be implied from the facts that Hill's accepted draft, with which to raise the means to pay the note, had been placed by Hill in the hands of Whitney, the promise would not be to Seaman, but to the Phoenix Bank, who then owned the note; although, in the course of the opinion of the court, it was stated that, in all cases the principle of which was sought to be applied to that case, the fund had been appropriated by an express undertaking of the defendant with the creditor. But before concluding the opinion of the court in this case, the learned judge who delivered it conceded that an undertaking to pay the creditor may be implied from an arrangement to that effect between the defendant and the debtor. This question was subsequently, and in a case quite recent, again the subject of consideration by the Supreme Court, when it was held, that in declaring upon a promise, made to the debtor by a third party to pay the creditor of the debtor, founded upon a consideration advanced by the debtor, it was unnecessary to aver a promise to the creditor; for the reason that upon proof of a promise made to the debtor to pay the creditor, a promise to the creditor would be implied. And in support of this proposition, in no respect distinguishable from the one now under consideration, the case of *Schemerhorn v. Vanderheyden*, with many intermediate cases in our courts, was cited, in which the doctrine of that case was not only approved but affirmed. *The Delaware and Hudson Canal Company v. The Westchester County Bank*, 4 Denio, 97.

The same principle is adjudged in several cases in Massachusetts. I will refer to but few of them. *Arnold v. Lyman*, 17 Mass. 400; *Hall v. Marston*, Id. 575; *Brewer v. Dyer*, 7 Cush. 337, 340. In *Hall v. Marston* the court say: "It seems to have been well settled that if A promises B for a valuable consideration to pay C, the latter may maintain assumpsit for the money"; and in *Brewer v. Dyer*, the recovery was upheld, as the court said, "upon the principle of law long recognized and clearly established, that when

one person, for a valuable consideration engages with another, by a simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement; that it does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases would seem to indicate, but upon the broader and more satisfactory basis, that the law operating on the act of the parties creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded." There is a more recent case decided by the same court, to which the defendant has referred, and claims that it at least impairs the force of the former cases as authority. It is the case of *Mellen v. Whipple*, 1 Gray, 317. In that case one Rollins made his note for \$500 payable to Ellis and Mayo, or order, and to secure its payment mortgaged to the payees a certain lot of ground, and then sold and conveyed the mortgaged premises to the defendant, by deed in which it was stated that the "granted premises were subject to a mortgage for \$500, which mortgage, with the note for which it was given, the said Whipple is to assume and cancel." The deed thus made was accepted by Whipple, the mortgage was afterwards duly assigned, and the note indorsed by Ellis and Mayo to the plaintiff's intestate. After Whipple received the deed he paid to the mortgagees and their assigns the interest upon the mortgage and note for a time, and upon refusing to continue his payments was sued by the plaintiff as administratrix of the assignee of the mortgage and note. The Court held that the stipulation in the deed that Whipple should pay the mortgage and note was a matter exclusively between the two parties to the deed; that the sale by Rollins of the equity of redemption did not lessen the plaintiff's security, and that as nothing had been put into the defendant's hands for the purpose of meeting the plaintiff's claim on Rollins, there was no consideration to support an express promise, much less an implied one, that Whipple should pay Mellen the amount of the note. This is all that was decided in that case, and the substance of the reasons assigned for the decision; and whether the case was rightly disposed of or not, it has not in its facts any analogy to the case before us, nor do the reasons assigned for the decision bear in any degree upon the question we are now considering.

But it is urged that because the defendant was not in any sense a trustee of the property of Holly for the benefit of the plaintiff,

the law will not imply a promise. I agree that many of the cases where a promise was implied were cases of trusts, created for the benefit of the promisor. The case of *Felton v. Dickinson* (10 Mass. 189, 190) and others that might be cited are of that class; but concede them all to have been cases of trusts, and it proves nothing against the application of the rule to this case. The duty of the trustee to pay the *cestuis que trust*, according to the terms of the trust, implies his promise to the latter to do so. In this case the defendant, upon ample consideration received from Holly, promised Holly to pay his debt to the plaintiff; the consideration received and the promise to Holly made it as plainly his duty to pay the plaintiff as if the money had been remitted to him for that purpose, and as well implied a promise to do so as if he had been made a trustee of property to be converted into cash with which to pay. The fact that a breach of the duty imposed in the one case may be visited, and justly, with more serious consequences than in the other, by no means disproves the payment to be a duty in both. The principle illustrated by the example so frequently quoted (which concisely states the case in hand), "that a promise made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach," has been applied to trust cases, not because it was exclusively applicable to those cases, but because it was a principle of law, and as such applicable to those cases.

It was also insisted that Holly could have discharged the defendant from his promise, though it was intended by both parties for the benefit of the plaintiff, and therefore the plaintiff was not entitled to maintain this suit for the recovery of a demand over which he had no control. It is enough that the plaintiff did not release the defendant from his promise, and whether he could or not is a question not now necessarily involved; but if it was, I think it would be found difficult to maintain the right of Holly to discharge a judgment recovered by the plaintiff upon confession or otherwise, for the breach of the defendant's promise; and if he could not, how could he discharge the suit before judgment, or the promise before suit, made as it was for the plaintiff's benefit and in accordance with legal presumption accepted by him (*Berly v. Taylor*, 5 Hill, 577-584, *et seq.*), until his dissent was shown. The cases cited, and especially that of *Farley v. Cleveland*, establish the validity of a parol promise; it stands then upon the footing of a written one. Suppose the defendant had given his note in which, for value received of Holly, he had promised to pay the

plaintiff and the plaintiff had accepted the promise, retaining Holly's liability. Very clearly Holly could not have discharged that promise, be the right to release the defendant as it may.

No one can doubt that he owes the sum of money demanded of him, or that in accordance with his promise it was his duty to have paid it to the plaintiff; nor can it be doubted that whatever may be the diversity of opinion elsewhere, the adjudication in this State, from the very early period, approved by experience, have established the defendant's liability; if, therefore, it could be shown that a more strict and technically accurate application of the rules applied would lead to a different result (which I by no means concede), the effort should not be made in the face of manifest justice.

The judgment should be affirmed.

JOHNSON, C. J., DENIO, SELDEN, ALLEN and STRONG, J. J. concurred. JOHNSON, C. J. and DENIO, J., were of opinion that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge, though taken without his being privy thereto.

COMSTOCK, J., and GROVER, J., dissented.

Judgment affirmed.¹³

¹³ "To give a third party who may derive a benefit from the performance of the promise an action, there must be, first, an intent by the promisee to secure some benefit to the third party, and second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally. . . . The courts are not inclined to extend the doctrine of *Lawrence v. Fox* (20 N. Y. 268) to cases not clearly within the principle of that decision. Judges have differed as to the principle upon which *Lawrence v. Fox* and kindred cases rest, but in every case in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise. Whether the decisions rest upon the doctrine of agency, the promisee being regarded as the agent for the third party, who, by bringing his action, adopts his acts, or upon the doctrine of a trust, the promisor being regarded as having received money or other thing for the third party, is not material. In either case there must be a legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit."—Allen, J., in *Vrooman v. Turner*, 69 N. Y. 280. Accord: *Jefferson v. Asch*, 53 Minn. 446.

BASSETT *et al.* v. HUGHES.

53 WISCONSIN, 319.—1877.

Action for balance of indebtedness due originally from Hugh W. Hughes (defendant's father) to the plaintiffs. Judgment for plaintiffs. Defendant appeals.

Hugh W. Hughes conveyed to defendant certain property in consideration of which defendant executed a bond in which he covenanted to pay all his father's debts. At that time the father owed the plaintiffs the debt in suit. Defendant made one payment on the debt, but refused to pay the balance.

Defendant sought to prove that his covenant with his father was rescinded by an agreement between him and his father, but the court excluded the testimony.

LYON, J. 1. It is settled in this State, that when one person, for a valuable consideration, engages with another to do some act for the benefit of a third person, the latter may maintain an action against the former for a breach of such engagement. This rule applies as well to covenants under seals as to simple contracts. *McDowell v. Laev*,¹⁴ 35 Wis. 171, and cases cited. In the present case, the defendant, for a valuable consideration, engaged with his father to pay the debt which the latter owed the plaintiffs, and, within the above rule, the plaintiffs may maintain this action to recover the unpaid balance of such debt.

2. It is quite immaterial, if the defendant's covenant to pay his father's debts was afterwards rescinded by mutual agreement between the parties to it. Before that was done, the plaintiffs had been informed of the covenant, and made no objection thereto; indeed, the fair inference from the testimony is, that the plaintiffs fully assented thereto; whether it was or was not competent for the parties to the covenant to rescind it before such notice to and assent by the plaintiffs, we need not here determine. Certain-

¹⁴ "Certainly upon the doctrine held in *Carnegie v. Morrison* (2 Met. 381, 396) and in *Brewer v. Dyer* (7 Cush. 337, 340), that the law, operating upon the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded, there can be no good reason assigned for withholding contracts under seal from the operation of the principle."—Dixon C. J. Accord: *Hughes v. Oregon Ry. & Nav. Co.*, 11 Ore. 437; *Jefferson v. Asch*, 53 Minn. 446. Contra: *Harms v. McCormick*, 132 Ill. 104.

ly after such notice and assent the covenant could not be rescinded to the prejudice of the plaintiffs, without their consent. To support the position that it was competent for the defendant and his father to rescind the contract and thus defeat the plaintiffs' right of action against the defendant, the learned counsel for the defendant cites two New York cases: *Kelly v. Roberts*, 40 N. Y. 432, and *Kelly v. Babcock*, 49 Id. 318. These cases do not sustain the position. In the first, it was held that an agreement, *upon no new consideration*, between debtor and creditor, that the debtor shall pay the amount of his debt to a third person, to whom the creditor is indebted, is not, in the absence of any notice or acceptance of or assent to the arrangement by such third person, irrevocable by the creditor. In the latter case, it was held that "an agreement in a bill of sale or instrument of transfer of personal property, that a portion of the purchase money of the goods sold may be paid to and among the creditors of the vendor, without a consent or agreement on the part of the vendee thus to pay, creates no trust; the balance unpaid is a debt due the vendor, and can be reached by and held under an attachment against his property." In this case the defendant covenanted to pay his father's debts; there was a new and valid consideration for such covenant; and the plaintiffs were notified that it had been made, and gave their assent thereto. Thus we find here all the conditions essential to the plaintiffs' right of action, which were wanting in those cases. We conclude that the testimony offered to show a rescission of the covenant was properly rejected.

* * * * *

Judgment affirmed.

WOOD *et al* v. MORIARTY.

15 RHODE ISLAND, 518.—1887.

Plaintiffs' petition for a new trial.

DURFEE, C. J. This is assumpsit for the price of lumber furnished to one Joshua W. Tibbetts for use in the erection of two houses for the defendant, Tibbetts having entered into a written contract with the defendant to build the houses before the lumber was furnished. Tibbetts, after going on for a while in the execution of the contract, released or assigned it to the defendant by

an instrument under seal. The instrument begins by reciting the existence of the contract, and proceeds as follows, to wit:

"Now know ye that, for good and sufficient reason, and in consideration of the sum of twenty-five dollars paid to me this day by said Moriarty, I hereby transfer and assign said contract back to said Thomas Moriarty, he agreeing to relieve me from further obligation under it, and I hereby releasing him from all claims or demands of whatever kind I may have or have had up to this day, August 26, 1885, against said Moriarty; I hereby acknowledging full payment for said claims and demands, and this shall be his receipt in full for the same to date, meaning hereby to convey to the said Moriarty all my right, title, and interest into and under said contract, desiring to relieve myself from completing the work under the contract, and hereby agree to withdraw from said work on said houses, and leave them to his sole charge and care."

At the trial, testimony was introduced or offered to prove the purchase of the lumber; the execution of the release or assignment; that the defendant, besides paying the consideration recited therein, agreed, by way of further consideration, to pay all bills incurred by Tibbetts on account of the contract released; that among these bills was the bill of the plaintiffs for lumber; and that notice of the arrangement between Tibbetts and the defendant was given by Tibbetts to the plaintiffs. The testimony as to the agreement to pay the bills incurred by Tibbetts was allowed to go in *de bene esse*, and at the close of the testimony for the plaintiffs the court directed a nonsuit. The plaintiffs petitioned for a new trial.

The questions are, whether the plaintiffs were entitled to prove by oral testimony that the defendant agreed to pay the bills incurred by Tibbetts under his contract, by way of further consideration for the release or assignment, and if so, whether, upon proof thereof, the plaintiffs could maintain their action.

The general rule is, that parol evidence is inadmissible to contradict, add to, subtract from, or vary the terms of any written instrument. But when the instrument is a deed, it is held to be no infringement of the rule to permit a party to prove some other consideration than that which is expressed, provided it be consistent with that which is expressed, and do not alter the effect of the instrument. 1 Greenleaf on Evidence, § 304. In *Miller v. Goodwin* (8 Gray 542) it was held that an agreement under seal by a man with a woman who afterwards became his wife, to convey certain real estate to her in consideration of past services, could be supplemented by parol proof that the agreement was for the further consideration of marriage between the parties. See

also *Villers v. Beaumont*, 2 Dyer, 146 a; 2 Phillips on Evidence, 655. In *McCrea v. Purmort* (16 Wend. 460) the consideration of a deed conveying land was expressed to be money paid, and it was held that parol evidence was admissible to show that the real consideration was iron of a specific quantity, valued at a stipulated price. *Murray v. Smith*, 1 Duer, 412; *Jordan v. White*, 20 Minn. 91; *Tyler v. Carlton*, 7 Me. 175; *Nickerson v. Saunders*, 36 Me. 413; *National Exchange Bank v. Watson*, 13 R. I. 91; 2 Phillips on Evidence, 655; Cowen & Hill's Notes, No. 490. We think the nonsuit is not sustainable on this ground.

The defendant contends that the agreement was within the statute of frauds, being an agreement not in writing to answer for the debt of another. But an agreement to answer for the debt of another, to come within the statute of frauds, must be an agreement with the creditor. A promise by A to B to pay a debt due from B to C is not within the statute of frauds. *Eastwood v. Kenyon*, 11 A. & E. 438; Browne on the Statute of Frauds, § 188. The contract here, as made between Tibbetts and the defendant, was certainly not within the statute.

The question, therefore, takes this form, namely, whether the plaintiffs are entitled to take advantage of the contract and bring suit upon or under it, and if so, whether to such suit the statute is not a good defense. Some of the cases cited for the plaintiffs cover both these points completely. *Barker v. Bucklin*, 2 Denio, 45; *Johnson v. Knapp*, 36 Iowa, 616; *Barker v. Bradley*, 42 N. Y. 316, 1 Am. Rep. 521; *Beasley v. Webster*, 64 Ill. 458; *Jordan v. White*, 20 Minn. 91; *Joslin v. New Jersey Car Spring Co.*, 36 N. J. Law, 141; *Townsend v. Long*, 77 Pa. St. 143, 146. Similar citations might be multiplied if we cared to load our opinion with them. See Browne on the Statute of Frauds, §§ 166 a, 166 b, and notes. On the other hand, the cases are numerous which hold that such an action is not maintainable for want of privity between the parties. Mr. Browne, in § 166 a, says that this is the settled doctrine in England, Michigan, and Connecticut; that in North Carolina and Tennessee the question seems to remain open; and that in Massachusetts the English doctrine seems to be growing in favor, contrary to the earlier cases; but that in the other States the creditor's right to sue has been generally recognized. The course of decision in this State favors the creditor's right to sue, and in principle, we think, recognizes it, though it has not hitherto extended to a purely oral contract. *Urquhart v. Brayton*, 12 R. I.

169; *Merriman v. Social Manufacturing Co.*, 12 R. I. 175. Courts that allow the action generally hold that it is not affected by the statute of frauds, though, as Mr. Browne remarks, they do not unite in the reasons which they give for so holding. Mr. Browne himself suggests that the contract, as between the creditor and promisor, arises by implication out of the duty of the promisor under his contract with the debtor, and that, being implied, it is not within the statute of frauds. Browne on the Statute of Frauds, § 166 b. The view accords with the doctrine of *Brewer v. Dyer* (7 Cush. 337), where the court remarks, p. 340, "that the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded."

The diversity of decision shows that the action cannot be maintained without resorting to implications or assumptions which the courts do not always find it easy to allow, and which they sometimes refuse to allow. It seems to us that we shall best find the grounds, if there are any, on which the action can be maintained, by an analysis or explication of the contract with the debtor. The contract is this: A agrees with B, for a consideration moving from B, to pay to C the debt which B owes to C. The contract is absolute. If A does not pay the debt, and B has to pay, it is broken. It is, therefore, a contract by A to pay the debt in lieu of B, or in relief of B; to take it on himself, and become, so far as he can independently of C, the debtor of C in place of B. The contract, as between A and B, is not collateral, but substitutional. But, this being so, how does C, who is not a party to it, get the right to sue A upon or by reason of it? It has been held that he gets this right directly from the contract itself, because B, in making it with A, makes it for C, if C desires to accede to it, as well as for himself, so that C has only to ratify or assent to it, which he does unequivocally by suing on it. But, in this view, if C accepts the contract, he must accept it as made; that is, as a contract by which A agrees that he, instead of B, will pay the debt which B owes to C. C cannot, at the same time, assent to the contract and dissent from the terms of it. Accordingly, if he sues A on the contract, he must sue him instead of B, and cannot also sue B, and B is therefore released. But, as we have seen, another view has been taken. It has been held that the contract between A and B imposes a duty upon A to pay to C the debt which B owes to him, and that from this duty the law implies a promise by A in favor

of C to pay B's debt to C. But if a promise is implied from the duty, the promise must correspond to the duty. The duty which the contract imposes upon A is that he, instead of B, shall pay the debt which B owes to C, and accordingly so must be the promise to be implied from it. If, therefore, C sues A upon the implied promise, he must sue him as liable, instead of B, for the debt of B to him, C; he cannot consistently sue both A and B, and consequently B is released.

We do not claim that either of these views is free from difficulty. Either of them, however, is free from one difficulty which other views encounter, and which is a principal reason why the courts which refuse to allow the action refuse to do so. Other views give the creditor the benefit of the new contract for nothing, since they allow him still to retain his hold upon the original debtor; whereas, according to either of the views above set forth, the creditor cannot have the benefit of the new contract without assenting to the terms of it, thereby releasing the original debtor, so that the assent is in itself a consideration. As cases which support these views, we will refer to *Warren v. Batchelder*, 16 N. H. 580; *Bohanan v. Pope*, 42 Me. 93. See also *Clough v. Giles*, 2 New Eng. Reporter, 870. Of course, if either view be correct, the liability under the contract is not collateral, but direct and substitutional, and therefore not within the statute of frauds.

We do not think this case is distinguishable in principle from *Urquhart v. Brayton*, 12 R. I. 169. The doctrine of the latter case is not only just and convenient, but also consonant with the purposes of the parties, and we are not prepared to recede from it. As is remarked by the court in *Lehow v. Simonton et al.* (3 Colorado, 346), "it accords the remedy to the party who in most instances is chiefly interested to enforce the promise, and avoids multiplicity of actions."

We think the declaration proper in point of form, and we do not think the nonsuit is justifiable on the ground of variance.

In *Warren v. Batchelder* (16 N. H. 580) the court held that a demand on the defendant was requisite before the suit. Whether this is so we need not decide, for the evidence in this case shows a demand before suit.

STINESS, J., non-concurring.

Petition granted ¹⁵

¹⁵ "When a creditor of a partnership after dissolution thereof, knowing that one or several of the partners have agreed with the others to assume

BORDEN *et al.* v. BOARDMAN.

157 MASSACHUSETTS, 410.—1892.

Contract. C. contracted to build a house for defendant. When the time for the first payment came defendant requested C to have present all persons having claims against the house. Plaintiffs had a claim for \$150, but were not present, and at C.'s request defendant reserved from the amount due C. \$200 out of which he promised to pay plaintiffs' claim. Plaintiffs subsequently asked defendant about the arrangement, and defendant said he held the money under the above agreement with C., but had been advised not to pay it at present. Defendant claimed that, upon the evidence, plaintiffs were not entitled to recover, and offered to show that a day or so after the above settlement C. had abandoned the contract, and that when plaintiffs inquired about the arrangement defendant informed them that C. had broken his contract, and that defendant was damaged thereby. This evidence was excluded and a verdict directed for plaintiffs. If the ruling was right, the judgment was to be entered on the verdict; otherwise, judgment for defendant.

MORTON, J. The evidence offered in bar was rightly excluded. The subsequent failure of Collins to perform his contract would not release the defendant from the obligation, if any, which he had assumed to the plaintiffs, in the absence of any agreement, express or implied, that the money was to be paid to the plaintiffs only in case Collins fulfilled his contract. *Cook v. Wolfendale*, 105 Mass. 401. There was no evidence of such an agreement.

The other question is more difficult. The case does not present a question of novation; for there was no agreement among the plaintiffs, Collins, and the defendant that the defendant should pay to the plaintiffs, out of the money in his hands and due to Collins, a specific sum, and that thenceforward the defendant should be released from all liability for it to Collins, and should be

and pay the debts of the firm, takes the negotiable notes of those who should pay, in payment of the debt of the firm, he thereby cancels the claim against the firm, and discharges the other partners. Story on Partnership, 276, 277 and 278; §§ 155, 156 and notes; Collier on Partnership, book 3, § 3, and cases cited; *Arnold v. Camp*, 12 J. R. 409; *Waydell v. Luer*, 3 Denio, 410."—Grover, J., in *Miller & v. Thorn*, 56 N. Y. 402, 406.

liable for it to the plaintiffs. Neither was there any agreement between the plaintiffs and the defendant that the latter would pay the money to them. The conversation between one of the plaintiffs and the defendant cannot be construed as affording evidence of such an agreement. Coupled with the defendant's admission that he was holding money for the plaintiffs was his repudiation of any liability to the plaintiffs for it. Neither can it be claimed that there was an equitable assignment of the amount in suit from Collins to the plaintiffs. There was no order or transfer given by him to them; nor was any notice of the arrangement between him and the defendant given by him to the plaintiffs. *Lazarus v. Swan*, 147 Mass. 330. The case upon this branch, therefore, reduced to its simplest form, is one of an agreement between two parties, upon sufficient consideration it may be between them, that one will pay, out of funds in his hand belonging to the other, a specific sum to a third person, who is not a party to the agreement, and from whom no consideration moves. It is well settled in this State that no action lies in such a case in favor of such third party to recover the money so held of the party holding it. *Exchange Bank v. Rice*, 107 Mass. 37, and cases cited; *Rogers v. Union Stone Co.*, 130 Mass. 581; *New England Dredging Co. v. Rockport Granite Co.*, 149 Mass. 381; *Marston v. Bigelow*, 150 Mass. 45; *Saunders v. Saunders*, 154 Mass. 337. Certain exceptions which were supposed to exist have either been shown not to exist or have been confined within narrower limits. *Exchange Bank v. Rice*, and *Marston v. Bigelow*, *ubi supra*.

We have assumed that the sum which the defendant agreed with Collins to pay the plaintiffs was specific. But it is to be observed that the agreement between the plaintiffs and Collins was that it should not cost more than one hundred and fifty dollars to put the building back. Collins told the defendant that the sum was due to the plaintiffs. The defendant reserved two hundred dollars. It may well be doubted, therefore, whether the defendant had in his hands a specific sum to be paid to the plaintiff, or whether he agreed with Collins to hold and pay the plaintiffs a specific sum. If the sum was not specific, the plaintiffs do not claim, as we understand them, that they can recover.

Judgment for the defendant.¹⁰

¹⁰ Accord: *Pipp v. Reynolds*, 20 Mich. 88; *Halsted v. Francis*, 31 Mich. 113; *Linneman v. Moross*, 98 Mich. 178; *Chamberlain v. Ins. Co.*, 55 N. H. 249 (*semble*). "In all the cases since *Tweddle v. Atkinson* (1 B. & S. 393),

BOSTON SAFE-DEPOSIT AND TRUST CO. *v.* SALEM
WATER CO. (SHARP, Intervener.)

94 FEDERAL REPORTER, 238.—1899.

(Circuit Court, N. D. Ohio.)

RICKS, District Judge. In December, 1892, at the suit of the Boston Safe-Deposit & Trust Company, trustee of the mortgage securing bonds of the Salem Water Company, a receiver was appointed for the water company. Thereafter Alonzo Sharp, as administrator of one Thomas Sharp, filed an intervening petition in this action against said receiver, alleging, among other things, that the Salem Water Company and its receiver derived their right to maintain and operate the water plant in the city of Salem from a certain contract, entered into on the 19th day of March, 1887, between the village of Salem and certain assignors of said water company, by the terms of which contract said water company was authorized to establish, maintain, and operate waterworks in said village, and was obligated to furnish "an abundant supply of water for fire, domestic, manufacturing, street, sewerage, and other proper purposes for a period of twenty years," and to "construct and maintain a standpipe as part of said system of waterworks, and to supply or attach to the same an electrical, pneumatic, or hydraulic valve, and to so connect the said valve with the said pump station of said works or system that said valve could be closed at any moment and the entire force of the pumps be confined to the mains, and to so construct and maintain said waterworks that the said Salem Water Company would be able to furnish a plentiful supply of water to said Salem and its inhabitants for personal, domestic, and manufacturing purposes, and also for the extinguishing of fires and conflagrations, and other proper purposes," and also to construct and maintain the same so as to be sufficient at all times to provide a certain pressure of water throughout the system. The intervener further states in his petition that on the 22d day of April, 1894, certain buildings, machinery, tools, etc., of which his decedent, Thomas Sharp, was the owner, were destroyed

in which a person not a party to a contract has brought an action to recover some benefit stipulated for him in it, he has been driven, in order to avoid being shipwrecked upon the common law rule which confines such an action to parties and privies, to seek refuge under the shelter of an alleged trust in his favor."—Street, J., in *Faulkner v. Faulkner*, 23 Ont. Rep. 252, 258.

by fire, the said fire not being caused by any negligence on the part of his decedent, but that the damage caused by said fire would not have exceeded \$300 had the receiver complied with the terms of said contract with the village of Salem, in which he was operating the waterworks, and that the receiver had failed in many respects to comply with his said contract, and by reason of his failure the intervener had been damaged in the sum of \$30,000. To this intervening petition the receiver filed a demurrer and exceptions, upon which the case was heard.

Counsel for the receiver maintained that there was no privity of contract between the intervener's decedent and either the Salem Water Company or its receiver, and that, in the absence of a duty resting either upon the common law or upon a contract, the Salem Water Company or its receiver owed no obligation to the intervener's decedent to comply with its contract with the village of Salem. That this action is not founded upon any common-law duty, and does not, therefore, sound in tort, is quite evident; that it is not based upon a contractual relation between the parties has been, with one exception, uniformly held in every jurisdiction within the United States where the question has arisen. *Davis v. Waterworks Co.*, 54 Iowa, 59, 6 N. W. 126; *Becker v. Waterworks*, 79 Iowa, 419, 44 N. W. 694; *Britton v. Waterworks Co.*, 81 Wis. 48, 51 N. W. 84; *Hays v. City of Oshkosh*, 33 Wis. 314; *Nickerson v. Hydraulic Co.*, 46 Conn. 24; *Eaton v. Waterworks Co.*, 37 Neb. 546, 56 N. W. 201; *Beck v. Water Co.* (Pa. Sup.), 11 Atl. 300; *Stone v. Water Co.*, 4 Pa. Dist. R. 431; *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 118; *Howsmon v. Water Co.*, 119 Mo. 304, 24 S. W. 784; *Fitch v. Water Co.* (Ind. Sup.), 37 N. E. 982; *Foster v. Water Co.*, 3 Lea, 42; *Ferris v. Water Co.*, 16 Nev. 44; *Fowler v. Waterworks Co.*, 83 Ga. 219, 9 S. E. 673; *Mott v. Manufacturing Co.*, 48 Kan. 12, 28 Pac. 989; *Bush v. Water Co.* (Idaho), 43 Pac. 69; *Wainwright v. Water Co.*, 78 Hun, 146, 28 N. Y. Supp. 987; *House v. Waterworks Co.* (Tex. Sup.), 31 S. W. 179; *Waterworks Co. v. Brownless*, 10 Ohio Cir. Ct. R. 620.

The general doctrine held by the foregoing cases is that, where a city contracts with a water company to furnish a supply of water for use in extinguishing fires, such supply to be paid for by a levy of taxes upon the taxpayers of the city, there is no such privity of contract between a citizen or resident of such city and the water company as will authorize such resident or citizen to maintain an action against said water company for the injury or destruction

of his property by fire caused by the failure of the water company to fulfill its contract; and this is held even where the ordinance granting the water company its franchise provides that the water company shall pay all damages that may accrue to any citizen of the city by reason of a failure on the part of such water company to supply a sufficient amount of water to put out fires. See *Mott v. Manufacturing Co.*, and other cases cited *supra*.

The only case in all the books where the water company has been held liable for failure to furnish sufficient water for the extinguishment of fires is the case of *Paducah Lumber Co. v. Paducah Water-supply Co.*,¹⁷ 89 Ky. 340, 12 S. W. 554, and 13 S. W. 249, in which case it was unnecessary for the court to have held this doctrine, as there was a private contract between the water company and the consumer for the furnishing of fire pressure. This Kentucky case has been repeatedly criticised by the courts of the various States in which this question has been decided. See *Mott v. Manufacturing Co.*, *Britton v. Waterworks Co.*, *Fitch v. Water Co.*, *Howsmon v. Water Co.*, *House v. Waterworks Co.*, *Waterworks Co. v. Brownless*, and *Eaton v. Waterworks Co.*, cited *supra*.

The following cases are cited to show the general grounds upon which privity of contract may be asserted by a person not a party thereto: *Simson v. Brown*, 68 N. Y. 355; *Burton v. Larkin*, 36 Kan. 249, 13 Pac. 398; *Wright v. Terry*, 23 Fla. 169, 2 South. 6; *House v. Waterworks Co.* (Tex. Sup.), 31 S. W. 180; *Anderson v. Fitzgerald*, 21 Fed. 294; *Second Nat. Bank of St. Louis v. Grand Lodge of Missouri A. F. & A. M.*, 98 U. S. 123; *Vrooman v. Turner*, 69 N. Y. 280; *Bank v. Rice*, 107 Mass. 37; *Safe Co. v. Ward*, 46 N. J. Law, 19.

That a city owning its own waterworks cannot be held liable for failure to furnish sufficient water supply to extinguish fires is undisputed. 2 Dill Mun. Corp. § 975; *Wheeler v. Cincinnati*, 19 Ohio St. 19; *Fowler v. Waterworks Co.*, 83 Ga. 222, 9 S. E. 673; *Wainwright v. Water Co.*, 78 Hun, 146, 28 N. Y. Supp. 987; *Tainter v. City of Worcester*, 123 Mass. 311; *Vanhorn v. City of Des Moines*, 63 Iowa, 447, 19 N. W. 293; *Hayes v. City of Oshkosh*, 33 Wis. 314; *Stone v. Water Co.*, 4 Pa. Dist. R. 431; *House v. Waterworks Co.* (Tex. Sup.), 31 S. W. 179, 185. If the city itself cannot be held liable for damage resulting from failure to furnish a fire pressure to its citizens, and if there is no privity of

¹⁷ See also *Gorrell v. Greensboro Water Supply Co.*, 124 N. Car. 328.

contract between the water company operating under a franchise from the city and the citizens or residents of such city, it is clear, upon principle as well as authority, that no legal obligation exists on the part of such water company and in favor of the individual citizen to maintain a sufficient pressure at the city water mains to extinguish fires which may occur upon the premises of such individual citizen.

On the 24th day of December, 1892, Calvin A. Judson was appointed receiver of the Salem Water Company. He afterwards resigned, and Herman A. Kelley was appointed his successor on the 19th of January, 1897. On March 19, 1887, a certain contract was entered into, by and between the common council of the village of Salem and Messrs. Turner, Clark & Rawson, of Boston, whereby the latter agreed to build and construct waterworks and stand-pipes, having improved engines and pumping facilities, and to furnish the city of Salem with water privileges of the character described in the petition. Afterwards, on the 22d day of April, 1894, the buildings, machinery, tools, patterns, and all property of every description on the premises described in the intervening petition, and owned by Thomas Sharp, were destroyed by fire. The intervenor declares and alleges that the fire could have been extinguished if proper machinery had been furnished by the company, and if the obligations on their part in the contract between themselves and the city had been faithfully observed. There was no contract between the intervening petitioner and the company, or the city, that in case of fire he should be reimbursed for any loss he might sustain. If there were such a contract that could be enforced, there would be some foundation for the petitioner's claim in this case; but I think, under the facts stated, there is no privity of contract, and the demurrer filed by the receiver must, therefore, be sustained, and the intervening petition dismissed. This case has been very fully briefed by the receiver, and, while it is not necessary to review the authorities, they seem overwhelming upon the propositions above stated.

GORRELL *v.* GREENSBORO WATER SUPPLY CO.

124 NORTH CAROLINA, 328.—1899.

Action by Gorrell against the Greensboro Water Supply Company to recover damages for a building alleged to have been

burned in consequence of the breach of the defendant's contract with the city of Greensboro to supply an adequate quantity of water for fire purposes.

CLARK, J. (After setting out the complaint.) The demurrer, so far as it relates to the merits of the case, is, substantially, that the complaint has stated no cause of action (1) because the plaintiff, though a citizen and taxpayer of Greensboro (as alleged in the complaint), is neither a party nor privy to the contract, the breach of which is the foundation of the action; (2) the failure of the defendant to furnish water was not the proximate cause of the plaintiff's loss.

It is true, the plaintiff is neither a party nor privy to the contract, but it is impossible to read the same without seeing that, in warp and woof, in thread and filling, the object is the comfort, ease, and security from fire of the people, the citizens of Greensboro. This is alleged by the eleventh paragraph of the complaint, and is admitted by the demurrer. The benefit to the nominal contracting party, the city of Greensboro, as a corporation, is small in comparison, and, taken alone, would never have justified the grants, concessions, privileges, benefits, and payments made to the water company. Upon the face of the contract, the principal beneficiaries of the contract in contemplation of both parties thereto were the water company on the one hand and the individual citizens of Greensboro on the other. The citizens were to pay the taxes to fulfill the money consideration named, and furnishing the individual citizens with adequate supply of water, and the protection of their property from fire, was the largest duty assumed by the company.

One not a party or privy to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach. This has been sustained by many decisions elsewhere. *Tillis v. Harrison*, 104 Mo. 270; *Lawrence v. Fox*, 20 N. Y. 268; *Simson v. Brown*, 68 N. Y. 355; *Vrooman v. Turner*, 69 N. Y. 280; *Wright v. Terry*, 23 Fla. 160; *Austin v. Seligman*, 18 Fed. 519; *Burton v. Larkin*, 36 Kan. 246. And even when the beneficiary is only one of a class of persons, if the class is sufficiently designated. *Johannes v. Insurance Co.*, 66 Wis. 50. It was considered, though without decision, by this court, in *Haun v. Burrell*, 119 N. C. 544, 548; and *Sams v. Price*, 119 N. C. 572. Especially is this so when the beneficiaries are the citizens of a municipality whose votes author-

ized the contract, and whose taxes discharge the financial burdens the contract entails. The officials who execute the contract are technically the agents of the corporation, but the corporation itself is the agent of the people, who are thus effectively the principals in the contract. The acceptance of the contract by the water company carries with it the duty of supplying all persons along its mains. *Griffin v. Water Co.*, 122 N. C. 206; *Hangen v. Water Co. (Or.)*, 28 Pac. 244.

In *Paducah Lumber Co. v. Paducah Water Supply Co.* (1889), 89 Ky. 340, it is held: "If a water company enter into a contract with a municipal corporation whereby the former agrees, in consideration of the grant of a franchise and a promise to pay certain specified prices for the use of hydrants, to construct waterworks of a specified character, force, and capacity, and to keep a supply of water required for domestic, manufacturing, and fire protection purposes for all the inhabitants and property of the city, a taxpayer of the city may recover of the water company when, through a breach of its contract, he is left without means of extinguishing fire, and his property is, on that account, destroyed;" and it is therein further held: "Where a party undertakes to furnish water in such mode and quantity that it may be used to extinguish fires in the city in which it is to be supplied, damages sustained by the destruction of buildings by the failure to so furnish such water is a natural and proximate consequence of such breach of the undertaking." This opinion is based upon sound reason, and is adopted by us. It is conclusive of both points raised as to the merits of the controversy by the demurrer. Indeed, it could not be doubted that, if the city buildings were destroyed by fire through failure of the defendant to furnish water for their protection, as provided by the contract, the city could recover. *New Orleans & N. E. R. Co. v. Meridian Waterworks Co.*, 72 Fed. 227. Besides, the complaint, in paragraphs 13 and 14, alleges that the defendant's failure to furnish water as per contract was the direct and sole cause of the loss, and this is admitted by the demurrer.

Thus, the question really narrows down to the question whether the beneficiaries of a contract, who furnish the consideration money of the contract, can maintain an action for damages caused by its breach. The case of *Paducah Lumber Co. v. Paducah Water Supply Co.* is exactly in point, was reaffirmed on a rehearing, and is followed by *Duncan v. Water Co.*, in the same volume, making three decisions altogether. The decisions, however (twelve in num-

ber), in other States where the question has been presented, are the other way. But this is a case of the first impression in this State, and decisions in other States have only persuasive authority. They have only the consideration to which the reasoning therein is entitled. They are to be weighed, not counted. We should adopt that line which is most consonant with justice and the "reason of the thing."

Did the people of Greensboro have just cause to believe that by virtue of that contract they, as well as the corporation, were guaranteed a sufficient quantity of water to protect their property from fire; and did the water company understand it was agreeing, for the valuable considerations named, to furnish a sufficient quantity of water to protect private as well as public property from fire? The intent is to be drawn from the instrument itself, and on its face there can be no doubt it was contracted that the water supply should be sufficient to protect private as well as public property. If so, it follows that when, by breach of that contract, private property is destroyed, the owner thereof, one of the beneficiaries contemplated by the contract, is the party in interest, and he, and he alone, can maintain an action for his loss.

As is said by Judge Freeman, the learned annotator of the American State Reports, in commenting on the fact (*Britton v. Waterworks Co.* [Wis.], 29 Am. St. Rep., at page 863), that the majority of decisions so far rendered were adverse to the position taken in the Kentucky case above cited, and approved by us: "As none of the courts has fairly faced what seems to be the logical result of these decisions, viz., that the injured person is left without any remedy at all, it must be admitted that the subject is left in an extremely unsatisfactory position. It seems to be universally agreed, and on the soundest reasoning, that the city itself is not liable for failing to protect the property of the taxpayers from fire, unless made liable by express statutory provisions. *Wright v. Augusta*, 78 Ga. 241. And it seems equally clear that the city would have no right of action in such case in behalf of the taxpayer, for the basis of all the [adverse] decisions is that there is no privity of contract between the taxpayers and the water companies. If the contract is not made for the benefit of the taxpayers in such a sense that they can sue upon it, it can hardly be maintained that the same contract is made for one of those taxpayers in such a sense that the city can recover damages in his name. . . . If, then, neither the taxpayer himself nor the city on

his behalf can sue the company, the conclusion seems to be that the loss by fire in these cases is regarded by the law as damage for which there is no redress." This is a complete *reductio ad absurdum*, and we prefer not to concur in cases, however numerous,—there are probably a dozen scattered through half a dozen States,—which led to such conclusion. All these cases (when not based on reference to the others) rest upon the narrow technical basis that a citizen, because not a privy to the contract, cannot sue, whereas authorities are numerous that a beneficiary of a contract, though not a party or privy, may maintain an action for its breach. 7 Am. & Eng. Enc. Law (2d ed.), 105-108. Here the water company contracted with the city to furnish certain quantities of water for the protection of the property of the citizens as well as of the city, and received full consideration, a large part of which comes in the shape of taxation, paid annually by those citizens. On a breach of the contract, whereby the property of a citizen is destroyed, he, as a beneficiary of the contract, is entitled to sue; and under our Code requiring the party in interest to be plaintiff he is the only one who can.

Whether there was a breach of the contract, and whether it was the proximate cause of the loss, regarded as matters of fact, will be determined by the jury, if, when the case goes back, the defendant shall file an answer, as it has a right to do (Code, § 272), raising those issues. But in overruling the demurrer to the complaint there was no error. As was said by the Supreme Court of Kentucky, when affirming, on a petition to rehear, the decision in the Paducah Case, *supra*: "The water company did not covenant to prevent occurrence of fires, nor that quantity of water agreed to be furnished would be a certain and effectual protection against every fire, and consequently does not in any sense occupy the attitude of an insurer; but it did undertake to perform the plain and simple duty of keeping water up to a designated height in the standpipe, and, if it failed or refused to comply with that undertaking, and such breach was the proximate cause of destruction of the plaintiff's property, which involves issues of fact for determination by a jury, there exists no reason for its escape from answering in damages that would not equally avail in case of any other breach of contract."

Affirmed.

FAIRCLOTH, C. J., and FURCHES, J., dissent.

ENGINEERING CASES: EXCERPTS FROM DECISIONS.

THIRD PARTIES.

A stipulation in an engineering contract, by which the contractor is to indemnify the owner for damages, does not give to a party injured a cause of action against the contractor. *French v. Viz* (N. Y. App.), 37 N. E. Rep. 612.

A provision in a contract that a city may retain money until the contractor shall have paid his laborers, does not give the laborers any rights against the city when the contractor has been paid in full. *Lawrence v. United States* (C. C.), 71 Fed. Rep. 228; *Old Dom. Gran. Co. v. District of Columbia*, 20 Ct. of Claims, 127.

A provision that the owner shall retain a certain percentage of the contract price till the completion of the work is for the benefit of the owner, and affords a ground of personal liability by the owner to subcontractors. *Steele v. McBurney* (Iowa), 65 N. W. Rep. 332; *Weller v. Goble*, 66 Iowa 113.

A bond given by contractors to a city, providing that they will pay for all labor and materials furnished, is a promise for the benefit of all persons furnishing labor and materials, and such persons may sue on it. *Lyman v. Lincoln* (Neb.), 57 N. W. Rep. 531; *Kauffman v. Cooper* (Neb.), 65 N. W. Rep. 796; *St. Louis v. Von Puhl* (Mo.), 34 S. W. Rep. 843.

If the bond be to pay for all materials furnished, the contractor is not liable to creditors of subcontractors for materials furnished. *Brower v. Thompson Lumber Co.* (Oreg.), 43 Pac. Rep. 659.

A subcontractor is not liable to the owner for negligently and unskilfully doing his work so that the owner is injured. The owner should bring suit against the principal contractor. *Bissel v. Roden*, 34 Mo. 63 (1864).

A subcontractor cannot hold the owner liable on his contract with the principal contractor, nor can the contractor be considered the agent of the owner and thus hold him. *Epeneter v. Montgomery Co.* (Iowa), 67 N. W. Rep. 93.

A third party told a contractor to go ahead and do the work ordered by the owner and he would pay for it. The owner had introduced the third party to the contractor as his partner. Held: not liable; that the promise to pay was without consideration. *Stidham v. Sanford*, 36 N. Y. Sup. Ct. 341 (1873).

A third party is not liable to a contractor for work done on the representation by the owner that said third party would pay for the work. *Stidham v. Sanford*, 36 N. Y. Super. Ct. 341 (1873).

Where a city has entered into a contract to furnish certain things to the citizens, the city and not the citizen is the proper party to bring action against the company for a breach of such contract. *Cleburne W. I. & L. Co. v. City of Cleburne* (Tex.), 35 S. W. Rep. 733.

The rules and regulations made by a private company to govern the acts of its agents cannot affect third parties with notice of such rules in contracts between third parties and agents of the company. *Blanding v. Davenport etc. Ry. Co.* (Ia.), 55 N. W. Rep. 81.

SECTION II.

ASSIGNMENT.

Ordinarily a contract affects only those who are parties to it. However, under certain circumstances the original parties may be changed and others take their places. This may be brought about by the act of the parties themselves or by the operation of rules of law.

(a) *By the act of the parties.*

1. A promisor cannot assign his liabilities under a contract into which he has entered without the consent of the promisee, nor a promisee be compelled to accept the fulfillment of the contract from any other person than the promisor.¹

2. A liability may be assigned by one of the parties with the consent of the other. This amounts to a rescission, by agreement, of one contract and the substitution of another with different parties.

3. At common law the right of action arising from a contract cannot be assigned so as to enable the assignee to sue upon it in his own name. He must sue in the name of the assignor or of his representative.

4. At common law the only way to transfer the rights under a contract is by means of a substituted agreement and not by assignment.²

5. If a debtor promises to pay a third party and the creditor

¹ *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S. 379.

² *Heaton v. Angier*, 7 N. H. 397.

assents to it, the third party cannot maintain an action against the debtor.³

6. If a creditor gives written authority to his debtor to pay a third party and the debtor acknowledges the authority in writing, this will not enable the third party to sue for the amount.⁴

7. In equity, and in many states according to statute,⁵ the rights of action arising out of a contract may be assigned so that the assignee may sue in his own name.⁶

8. Only rights relating to money or property are assignable; a contract for personal service is not assignable.⁷

9. Consideration must pass from the assignee to support the assignment.

10. Notice must be given the other party to the contract in order to bind him by the assignment.⁸ This need not necessarily be in writing.⁹

11. In some jurisdictions successive assignees rank as to the priority of notice;¹⁰ in others they rank according to the dates on which the creditor assigned his rights to them.¹¹

12. The assignee takes the contract subject to all such defenses

³ *McKinney v. Alvis*, 14 Ill. 33.

⁴ *Jessel v. Williamsburgh Ins. Co.*, 3 Hill (N. Y.) 88.

⁵ In New York and some other states the statutes now allow the assignee to sue in his own name: N. Y. Code of Civil Procedure, §§ 1909, 1910. These statutes apply simply to the procedure of their own jurisdictions. They do not affect the legal title. If a contract has been assigned in the State of New York and an action brought in Massachusetts, such an action must be brought by the assignee in the name of the assignor. In other words, the above sections of the New York statute affect the adjective and not the substantive law.

⁶ "An assignment cannot be enforced in equity if the assignee can proceed at law in the name of his assignor unless the legal remedy would be incomplete or inadequate." *Carter v. United Ins. Co.*, 1 Johns. Ch. (N. Y.) 463; *Walker v. Brooks*, 125 Mass. 241; *New York etc. Co. v. Memphis Water Co.*, 107 U. S. 205. The two cases in which the assignment is most commonly enforced in equity are: first, the assignment of future interests, and second, the assignment of part of a demand. *Field v. Mayor*, 2 Seld. (N. Y.) 179; *James v. Newton*, 142 Mass. 366.

⁷ *Hayes v. Willio*, 4 Daly (N. Y. C. P.) 259.

⁸ *Heerman v. Ellsworth*, 64 N. Y. 159.

⁹ *Allen v. Brown*, 44 N. Y. 288; *Walker v. Mauro*, 18 Mo. 564.

¹⁰ *Van Buskirk v. Hartford Fire Ins. Co.*, 14 Conn. 141; *Clodfelter v. Cox*, 1 Sneed (Tenn.) 330; *Ward v. Morrison*, 25 Vt. 593.

¹¹ *Muir v. Schenck*, 3 Hill (N. Y.) 228; *Williams v. Ingersoll*, 89 N. Y. 598; *Thayer v. Daniels*, 113 Mass. 129.

as might have been effective against the assignor. That is, the assignor cannot give better title than he has himself.¹²

13. In the case of negotiable instruments, the holder of the document for the time being has a right of action upon it, though he is unknown to the promisor.¹³ Notice to the party liable is not necessary. The holder is not subject to such defenses as would be good against his assignor;¹⁴ that is, the assignor's title is immaterial.

(b) *By operation of law.*

1. Death or bankruptcy effects an assignment of the rights and liabilities of the deceased to his executor or administrator, or of the bankrupt to his trustees, merely for the purpose of continuing the legal existence of the deceased or bankrupt.

2. At common law, if a lessee of property assigns his lease, his assignee is bound to the landlord by the same liabilities and is entitled to the same benefits and rights as his assignor if the covenants "touch and concern the thing demised" and are not personal.¹⁵ The covenants affecting leasehold interests are said to "run with the land."

3. At common law, if the reversioner or landlord assigned his leasehold interest in the land, he did not formerly convey his rights and liabilities to the assignee. In other words, the covenants did not run with the reversion. This has been changed by statute. The assignee of the reversion now takes the benefits and is subject to the liabilities of the covenants entered into with his assignor. These covenants must "concern the thing demised" and not be personal. This applies only to leases under seal, but in the case of leases from year to year, payment and acceptance of rent is held to be evidence from which a jury may infer "consent to go on, on the same terms as before."¹⁶

4. If the covenant is made with the owner of the land, the person who has the freehold interest, for his benefit and under seal, at

¹² *Warner v. Whittaker*, 6 Mich. 133; *Lane v. Smith*, 103 Pa. St. 415; *Holbrook v. Burt*, 22 Pick. (Mass.) 546.

¹³ *Odell v. Gray*, 15 Mo. 337; *Walker v. Ocean Bank*, 19 Ind. 247.

¹⁴ *New v. Walker*, 108 Ind. 365; *Walker v. Ebert*, 29 Wis. 194.

¹⁵ *Thompson v. Rose*, 8 Cow. (N. Y.) 266; *Gordon v. George*, 12 Ind. 408; *Newburg Petroleum Co. v. Weare*, 44 Ohio St. 604.

¹⁶ *Fisher v. Deering*, 60 Ill. 114; *Crawford v. Chapman*, 17 Ohio St. 449; see Stimson, Am. St. Law, § 1352.

common law it passes to his assignee provided it touches and concerns the land and is not personal.¹⁷

5. In cases of death, covenants attached to a leasehold interest—provided they are not for personal service¹⁸ or skill—pass with the personality, as to benefits and liabilities, to the representatives; while covenants attached to the freehold interest pass to the heirs or devisees with the realty.

6. In case of bankruptcy, since all the bankrupt's property has passed to the trustee, he may disclaim unprofitable contracts within twelve months of his appointment.

CASES.

SECTION II.—ASSIGNMENT.

Assignment by act of the parties: liabilities.

ARKANSAS VALLEY SMELTING CO. v. BELDEN MINING CO.

127 UNITED STATES, 379.—1888.

Action for damages for breach of contract. Demurrer to complaint sustained. Plaintiff brings error.

Defendants contracted with Billing and Eilers to sell and deliver to them 10,000 tons of carbonated lead ore at the rate of 50 tons a day, on condition that "all ore so delivered shall at once, upon the delivery thereof, become the property of the second party." The ore after delivery was to be sampled and assayed in lots of about 100 tons each, the price to be fixed in accordance with the state of the New York market on the day of the delivery of samples. Defendants delivered some ore to Billing and Eilers under this contract, when the firm was dissolved and the business, together with the above contract, assigned to G. Billing, to whom defendants continued to deliver ore. The business, together with the above contract, was then assigned by G. Billing to plaintiff, who

¹⁷ *Shaber v. St. Paul Water Co.*, 30 Minn. 179.

¹⁸ *Lacy v. Getman*, 119 N. Y. 109; *Dickinson v. Calahan's Admrs.*, 19 Pa. St. 227; *Siler v. Gray*, 86 N. C. 566. Statutes have very greatly enlarged the number of actions which survive.

notified defendant of the fact. Defendant refused to deliver to plaintiff and notified plaintiff that it considered the contract canceled and annulled.

GRAY, J. If the assignment to the plaintiff of the contract sued on was valid, the plaintiff is the real party in interest, and as such entitled, under the practice in Colorado, to maintain this action in its own name. Rev. Stat. § 914; Colorado Code of Civil Procedure, § 3; *Albany & Rensselaer Co. v. Lundberg*, 121 U. S. 451. The vital question in the case, therefore, is whether the contract between the defendant and Billing and Eilers was assignable by the latter, under the circumstances stated in the complaint.

At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable.

But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, "you have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract." *Humble v. Hunter*, 12 Q. B. 310, 317; *Winchester v. Howard*, 97 Mass. 303, 305; *Boston Ice Co. v. Potter*, 123 Mass. 28; *King v. Batterson*, 13 R. I. 117, 120; *Lansden v. McCarthy*, 45 Missouri, 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise. "Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." Pollock on Contracts (4th ed.), 425.

The contract here sued on was one by which the defendant agreed to deliver ten thousand tons of lead ore from its mines to Billing and Eilers at their smelting works. The ore was to be delivered at the rate of 50 tons a day, and it was expressly agreed that it should become the property of Billing and Eilers as soon as delivered. The price was not fixed by the contract, or payable upon the delivery of the ore. But as often as a hundred tons of ore had been delivered, the ore was to be assayed by the parties or

one of them, and, if they could not agree, by an umpire; and it was only after all this had been done, and according to the result of the assay, and the proportions of lead, silver, silica, and iron, thereby proved to be in the ore, that the price was to be ascertained and paid. During the time that must elapse between the delivery of the ore and the ascertainment and payment of the price, the defendant had no security for its payment, except in the character and solvency of Billing and Eilers. The defendant, therefore, could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted.

The fact that upon the dissolution of the firm of Billing and Eilers, and the transfer by Eilers to Billing of this contract, together with the smelting works and business of the partnership, the defendant continued to deliver ore to Billing according to the contract, did not oblige the defendant to deliver ore to a stranger, to whom Billing had undertaken, without the defendant's consent, to assign the contract. The change in a partnership by the coming in or the withdrawal of a partner might perhaps be held to be within the contemplation of the parties originally contracting; but, however that may be, an assent to such a change in the one party cannot estop the other to deny the validity of a subsequent assignment of the whole contract to a stranger. The technical rule of law, recognized in *Murray v. Harway* (56 N. Y. 337), cited for the plaintiff, by which a lessee's express covenant not to assign has been held to be wholly determined by one assignment with the lessor's consent, has no application to this case.

The cause of action set forth in the complaint is not for any failure to deliver ore to Billing before his assignment to the plaintiff (which might perhaps be an assignable chose in action), but it is for a refusal to deliver ore to the plaintiff since this assignment. Performance and readiness to perform by the plaintiff and its assignors, during the periods for which they respectively held the contract, is all that is alleged; there is no allegation that Billing is ready to pay for any ore delivered to the plaintiff. In short, the plaintiff undertakes to step into the shoes of Billing, and to substitute its liability for his. The defendant had a perfect right to decline to assent to this, and to refuse to recognize a party, with whom it had never contracted, as entitled to demand further deliveries of ore.

The cases cited in the careful brief of the plaintiff's counsel, as

tending to support this action, are distinguishable from the case at bar, and the principal ones may be classified as follows:

First. Cases of agreements to sell and deliver goods for a fixed price, payable in cash on delivery, in which the owner would receive the price at the time of parting with his property, nothing further would remain to be done by the purchaser, and the rights of the seller could not be affected by the question whether the price was paid by the person with whom he originally contracted or by an assignee. *Sears v. Conover*, 3 Keyes, 113, and 4 Abbot (N. Y. App.), 179; *Tyler v. Barrows*, 6 Robertson (N. Y.), 104.

Second. Cases upon the question how far executors succeed to rights and liabilities under a contract of their testator. *Hambly v. Trott*, Cowper, 371, 375; *Wentworth v. Cock*, 10 Ad. & El. 42, and 2 Per. & Dav. 251; Williams on Executors (7th ed.), 1723-1725. Assignment by operation of law, as in the case of an executor, is quite different from assignment by act of the party; and the one might be held to have been in the contemplation of the parties to this contract, although the other was not. A lease, for instance, even if containing an express covenant against assignment by the lessee, passes to his executor. And it is by no means clear that an executor would be bound to perform, or would be entitled to the benefit of, such a contract as that now in question. *Dickinson v. Calahan*, 19 Penn. St. 227.

Third. Cases of assignments by contractors for public works, in which the contracts, and the statutes under which they were made, were held to permit all persons to bid for the contracts, and to execute them through third persons. *Taylor v. Palmer*, 31 California, 240, 247; *St. Louis v. Clemens*, 42 Missouri, 69; *Philadelphia v. Lockhardt*, 73 Penn. St. 211; *Devlin v. New York*, 63 N. Y. 8.

Fourth. Other cases of contracts assigned by the party who was to do certain work, not by the party who was to pay for it, and in which the question was whether the work was of such a nature that it was intended to be performed by the original contractor only. *Robson v. Drummond*, 2 B. & Ad. 303; *British Waggon Co. v. Lea*, 5 Q. B. D. 149; *Parsons v. Woodward*, 2 Zabriskie, 196.

Without considering whether all the cases cited were well decided, it is sufficient to say that none of them can control the decision of the present case.

Judgment affirmed.

Assignment of rights by act of the parties: at common law.**HEATON v. ANGIER.**

7 NEW HAMPSHIRE, 397.—1835.

Assumpsit for a wagon sold and delivered. Verdict for plaintiff, subject to the opinion of the court upon the following case.

The plaintiff, on the 29th of March, 1832, sold the wagon to the defendant at auction for \$30.25. Immediately afterwards, on the same day, one John Chase bought the wagon of the defendant for \$31.25. Chase and the defendant then went to plaintiff, and Chase agreed to pay the \$30.25 to the plaintiff for the defendant, and the plaintiff agreed to take Chase as paymaster for that sum; and thereupon Chase took the wagon and went away.

GREEN, J. In *Tatlock v. Harris* (3 D. & E. 180), Buller, J., said: "Suppose A owes B £100, and B owes C £100, and the three meet and it is agreed between them that A shall pay C the £100, B's debt is extinguished, and C may recover the sum from A."

The case thus put by Buller is the very case now before us. Heaton, Angier, and Chase being together, it was agreed between them that the plaintiff should take Chase as his debtor for the sum due from the defendant. The debt due to the plaintiff from the defendant was thus extinguished. It was an accord executed. And Chase, by assuming the debt due to the plaintiff, must be considered as having paid that amount to the defendant, as part of the price he was to pay the defendant for the wagon.

The agreement of the plaintiff to take Chase as his debtor was clearly a discharge of the defendant. *Wilson v. Coupland*, 5 B. & A. 228; *Wharton v. Walker*, 4 B. & C. 163; *Cuxon v. Chadley*, 3 B. & C. 591.

A new trial granted.

McKINNEY v. ALVIS.

14 ILLINOIS, 33.—1852.

Action for the value of certain rails. Judgment for plaintiff.

TRUMBULL, J. One Piper, since deceased, had a claim on McKinney for eight hundred rails, which Alvis, under a claim of purchase from Piper, called on McKinney to pay to him. McKin-

ney agreed to deliver the rails to Alvis, but failing to comply with his contract, Alvis sued to recover their value.

The important question in this case, and the only one we deem it necessary to notice is, can Alvis maintain the action in his own name?

It is a general rule that choses in action, except negotiable instruments, are not assignable at law so as to authorize the assignee to maintain an action in his own name; but it is insisted that an express promise, as in this case, to pay the debt to the assignee, forms an exception to the rule. To constitute an exception, however, in a case like this, requires something more than a mere promise on the part of the debtor to pay to the assignee; there must be a communication, and a new arrangement between all the parties, by which the assignor's claim upon his debtor, and his liability to the assignee, are extinguished. In this case there was no communication between Piper and McKinney; nor did Alvis agree to release Piper, and look alone to McKinney for the debt. It is not like the case put in the books, where it is said: "Suppose A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100, B's debt is extinguished, and C may recover that sum against A." Chitty on Contracts, 482, 613; *Wharton v. Walker*, 4 Barnwell & Cresswell, 163; *Butterfield v. Hartshorn*, 7 N. H. 345. Nor is it a case where one person can be said to have withheld the money of another, and thereby subjected himself to an action at the suit of the latter for money had and received; but it is an attempt to maintain an action in his own name, by the assignee of a contract for the delivery of certain articles of personal property, on the ground alone of an express parol promise by the debtor to pay the property to him. No consideration for the promise is shown by the record, for it does not appear that the defendant was released by it from his liability to Piper, nor is there any legitimate evidence in the record of a transfer of the claim by Piper to Alvis.

Judgment reversed, and cause remanded.

ROCHESTER LANTERN CO. *v.* STILES AND PARKER
PRESS CO.

135 NEW YORK, 209.—1892.

Action for damages for alleged breach of contract. Judgment for plaintiff affirmed at General Term. Defendant appeals.

EARL, C. J. In disposing of this case, we must take the facts as found by the referee, and they are as follows:

On the 19th day of March, 1887, James H. Kelly entered into a contract with the defendant whereby it was to make and deliver to him certain dies to be used by him in the manufacture of lanterns; that it agreed to make and deliver the dies within a reasonable time, that is, within five weeks from the time of the order, to manufacture and deliver the same; that the plaintiff was incorporated shortly prior to the 27th day of August, 1887, and on the twenty-ninth day of that month Kelly duly assigned to the plaintiff his contract with the defendant, and all his rights and claims thereunder; that the plaintiff failed to establish by evidence that at or prior to the time of making the contract, the defendant was informed that any corporation was intended to be organized, or that the contract was made for the use or benefit of any other person or corporation than Kelly; that the first notification received by the defendant that the plaintiff had any interest in the contract, or that such a corporation as the plaintiff existed, so far as was proven upon the trial, was given to it by a letter dated March 22, 1888, and signed "Rochester Lantern Company, by James H. Kelly, President"; that from time to time after making the contract samples were sent by Kelly to the defendant and dies were shipped to him by the defendant; that the last sample for the last die to be made was sent by Kelly to the defendant on the 29th day of July, 1887; that by the conduct of Kelly and the defendant performance of the contract within the time originally stipulated was waived, and the contract except as to time of performance was regarded as still in force at the date of the assignment thereof; that a reasonable time in which the defendant could have carried out and performed the contract after August 29, 1889, was five weeks, which expired October third; that Kelly was a manufacturer of lanterns in Rochester and required the dies for the manufacture of lanterns which he designed to put upon the market as the defendant was

informed and well knew, and that the plaintiff after its incorporation succeeded him in the business of manufacturing lanterns; that the defendant failed to carry out the contract and to furnish dies as thereby required; that the plaintiff, for the sole purpose of carrying on the business of manufacturing the lanterns which it was intended that these dies should make, entered into certain obligations and incurred certain liabilities as follows: It paid one Butts for rent of room from October 3 to November 1, 1887, the sum of \$31.86; it paid one Broad, an employé, for his wages from October 3, 1887, to March 24, 1888, the sum of \$250; and one Briston, an employé, for his wages during the same time the same sum; it paid to Crouch & Sons for the rent of premises from November 1, 1887, to March 24, 1888, \$278.46; that by reason of defendant's failure to perform the contract as agreed by it the plaintiff was unable to manufacture any lanterns for the market until after the commencement of this action on the 24th day of March, 1888, and that the plaintiff by reason of such failure sustained loss in the sums above mentioned which it actually paid, and the referee awarded judgment for the amount of the items above specified.

We do not think these facts sufficient to justify the recovery of the items of damages specified. There had been no breach of the contract at the time of the assignment thereof to the plaintiff, and at that time Kelly had no claim against the defendant for damages. After the assignment Kelly had no interest in the contract and the defendant owed him no duty and could come under no obligation to him for damages on account of a breach of the contract by it.

There is no doubt that Kelly could assign this contract as he could have assigned any other chose in action, and by the assignment the assignee became entitled to all the benefits of the contract. *Devlin v. Mayor &c.*, 63 N. Y. 8. The contract was not purely personal in the sense that Kelly was bound to perform in person, as his only obligation was to pay for the dies when delivered, and that obligation could be discharged by any one. He could not, however, by the assignment, absolve himself from all obligations under the contract. The obligations of the contract still rested upon him, and resort could still be made to him for the payment of the dies in case the assignee did not pay for them when tendered to it. After the assignment of the contract to the

plaintiff the defendant's obligation to perform still remained, and that obligation was due to the plaintiff, and for a breach of the obligation it became entitled to some damages, and so we are brought to the measure of damages in such a case as this.¹⁹

It is frequently difficult in the administration of the law to apply the proper rule of damages, and the decisions upon the subject are not harmonious. The cardinal rule undoubtedly is that the one party shall recover all the damage which has been occasioned by the breach of the contract by the other party. But this rule is modified in its application by two others: The damages must flow directly and naturally from the breach of the contract, and they must be certain, both in their nature and in respect to the cause from which they proceeded. Under this latter rule speculative, contingent, and remote damages which cannot be directly traced to the breach complained of are excluded. Under the former rule such damages only are allowed as the parties may fairly

¹⁹ "We have not overlooked the distinction pointed out by counsel between executory contracts and contracts which have been executed on one side. What we have said applies where something remains to be done by the party who assigns. And as a matter of course (since a party cannot release himself from an obligation by his own act without the consent of the other party), it is only the benefit of a contract which can be assigned. Where there is a burden, it cannot be transferred without the consent of the other party. Civ. Code, sec. 1457."—Hayne, C., in *La Rue v. Groezinger*, 84 Cal. 281.

"When the contract is executory in its nature, and an assignee or personal representative can fairly and sufficiently execute all that the original contractor could have done, the assignee or representative may do so and have the benefit of the contract. . . . In principle it would not impair the rights of the assignee, or destroy the assignable quality of the contract or claim, that the assignee, as between himself and the assignor, has assumed some duty in performing the conditions precedent to a perfected cause of action, or is made the agent or substitute of the assignor in the performance of the contract. If the service to be rendered or the condition to be performed is not necessarily personal, and such as can only with due regard to the intent of the parties, and the rights of the adverse party, be rendered or performed by the original contracting party, and the latter has not disqualified himself from the performance of the contract, the mere fact that the individual representing and acting for him is the assignee, and not a mere agent or servant, will not operate as a rescission of, or constitute a cause for, terminating the contract. Whether the agent for performing the contract acts under a naked power, or a power coupled with an interest, cannot affect the character or vary the effect of the delegation of power by the original contractor."—Allen, J., in *Devlin v. Mayor*, 63 N. Y. 8, 17-18, 15-16.

be supposed when they made the contract to have contemplated as naturally following its violation. *Hadley v. Baxendale*, 9 Excheq. 341; *Griffin v. Colver*, 16 N. Y. 489; *Leonard v. N. Y. &c. Tel. Co.*, 41 Id. 544, 566; *Cassidy v. Le Fevre*, 45 Id. 562.

The natural and obvious consequence of a breach of this contract on the part of the defendant would be to compel Kelly or his assignee to procure the dies from some other manufacturer, and the increased cost of the dies, if any, would be the natural and ordinary measure of the damages; and such would be the damages which it could be fairly supposed the parties expected, when they made the contract, would flow from a breach thereof. It does not appear that Kelly was engaged in the manufacture of lanterns when the contract was made, or that he contemplated engaging in the business until dies were furnished. No fact is found showing that the defendant had any reason to suppose that he would hire any workmen or persons before the dies were furnished, and it cannot be said that it was a natural and proximate consequence of a breach of the contract that he would have idle men or unused real estate causing him the expenses now claimed. Much less can it be supposed that the defendant could, when the contract was made, anticipate that the contract would be assigned and that the assignee would employ men and premises to remain idle after the defendant had failed to perform the contract and in consequence of such failure. Such damages to the assignee could not have been contemplated as the natural and proximate consequence of a breach of the contract. If we should adopt the rule of damages contended for by the plaintiff, what would be the limits of its application? Suppose instead of employing two men, the plaintiff had projected an extensive business in which the dies were to be used, and had employed one hundred men, and had hired or even constructed a large and costly building in which to carry on the business, and had kept the men and the building unemployed for months, and, perhaps, years, could the whole expense of the men and building be visited on the defendant as a consequence of its breach of contract? If it could, we should have a rule of damages which might cause ruin to parties unable from unforeseen events to perform their contracts.

The damages allowed by the referee in this case are special damages, not flowing naturally from the breach of the contract, and, we think, the only damages such an assignee in a case like this can

recover is the difference between the contract price of these dies and the value or cost of the dies if furnished according to the contract. Even if Kelly could have recovered special damages, we see no ground for holding that his assignee, of whose connection with the contract the defendant had no notice, could recover special damages not contemplated when the contract was made.

We are, therefore, of opinion that the award of damages made by this judgment was not justified by the facts found, and that the judgment should be reversed and a new trial granted, costs to abide event. All concur.

Judgment reversed.

HAYES v. WILLIO.

4 DALY (N. Y. C. P.), 259.—1872.

Injunction to restrain defendant from playing at any other theater than the plaintiff's. Motion to vacate injunction denied. Defendant appeals. Also, appeal from an order denying a motion to vacate a writ of *ne exeat* against the defendant.

K. engaged defendant to appear as a contortionist, bird imitator, and pantomimist under K.'s personal control at such places as K. might direct. K. assigned the contract to plaintiff.

ROBINSON, J. As a general rule, a contract for the performance of personal duties or services is unassignable, so as to vest in the assignee the right to compel its execution. Ch. on Cont. 739; Burrell on Assignments, 67, and cases cited, note 3. As to slaves it is different; but as to apprentices, an assignment of their indentures merely operates as a covenant that they shall serve the assignees (*Nickerson v. Howard*, 19 Johns. 113), except as to the indenture of an infant immigrant to pay his passage, as authorized by 2 R. S. 156, §§ 12, 13, 14; and as to convicts, the right of control still remains in the officer of the State. *Horner v. Wood*, 23 N. Y. 350.

These considerations do not appear to have been presented on the motion for the orders for the injunction and *ne exeat*, now under review; they are controlling as to the merits of this controversy, and without discussing the other questions presented on the argument and in the opinion of the judge who granted the orders, these

orders should be reversed, with costs, and the *ne exeat* superseded and discharged.

Order reversed.²⁰

Assignment of rights by act of the parties: in equity.

CARTER *et al.* v. UNITED INS. CO.

1 JOHNSON'S CHANCERY (N. Y.), 463.—1815.

Bill in equity by plaintiffs as assignees of an insurance policy. Demurrer to bill on the ground that the plaintiffs had an adequate remedy at law.

The policy was issued to Titus & Gibbs on 500 barrels of flour from Newport to St. Jago de Cuba on board the Spanish brig *Patriota*, which was captured by a Carthagena privateer. Titus & Gibbs assigned the policy to the plaintiffs in trust for creditors. Defendants refused to pay the loss.

THE CHANCELLOR. The demand is properly cognizable at law, and there is no good reason for coming into this court to recover on the contract of insurance. The plaintiffs are entitled to make use of the names of Gibbs & Titus, the original assured, in the suit at law; and the nominal plaintiffs would not be permitted to defeat or prejudice the right of action. It may be said here, as was said by the chancellor in the analogous case of *Dhege-toft v. The London Assurance Company* (Mosely, 83), that, at this rate, all policies of insurance would be tried in this court. In that case the policy stood in the name of a nominal trustee; but that was not deemed sufficient to change the jurisdiction; and the demurrer to the bill was allowed, and the decree was afterwards affirmed, in Parliament. 3 Bro. P. C. 525. The bill in this case states no special ground for equitable relief; nor is there any discovery sought which requires an answer.

Bill dismissed with costs.²¹

²⁰ For assignment of salary, pension, or fees of public office, see *Bowery N. B. v. Wilson*, 122 N. Y. 478; fees of executor, *Matter of Worthington*, 141 N. Y. 9. For assignment of insurance policies, see *Warnock v. Davis*, 104 U. S. 775.

²¹ "We have lately decided, after full consideration of the authorities, that an assignee of a chose in action on which a complete and adequate

FIELD v. THE MAYOR &c. OF NEW YORK, *et al.*

2 SELDEN (6 N. Y.), 179.—1852.

Bill in equity. Bill dismissed by trial court. Decree reversed in Supreme Court. Defendants appeal.

Defendant Bell had certain contracts with defendant corporation for printing to be done by him for the city. On March 14, 1842, he assigned to G. all bills that might become due to him for job printing, paper, or stationery done or furnished the defendant corporation, to the amount of \$1,500, after two other assignments should be paid, viz., one for \$1,500 to L., and one of \$300 to C. Afterward on April 28, 1842, G. assigned the claim to plaintiff. Plaintiff gave the city notice of the claim on April 30, 1842.

Bell did work for the city after the assignment, and after the notice, but the city paid the amount due for it to Bell. Bell was insolvent.

The report of the referee showed that there became due to Bell after March 14, 1842, and after providing for the claims of L. and C. far more than enough to satisfy plaintiff's claim.

WELLS, J. By the assignment from Bell to Garread, of March 14, 1842, it was intended to transfer to and vest in the latter, the right and interest of the former in and to all the bills which might thereafter become due to him from the corporation of the city of New York, for job printing, paper, or stationery, done or furnished by Bell either before or after the date of the assignment, to the amount of \$1,500; subject to the two prior assignments, to Lloyd & Hopkins, and to Coit. By the assignment from Garread to the respondent of April 28th, and the release from the former to the latter, of December 27, 1842, the latter acquired all the right and interest of the former in the first assignment.

The case shows, that at the time of the commencement of the suit in the court of chancery, bills of the description mentioned had become due from the corporation to Bell, to an amount more than sufficient to satisfy all three of the assignments.

remedy exists at law cannot, merely because his interest is an equitable one, bring a suit in equity for the recovery of the demand. *Hayward v. Andrews*, 106 U. S. 672. He must bring an action at law in the name of the assignor to his own use."—Mr. Justice Bradley, in *New York &c Co. v. Memphis Water Co.*, 107 U. S. 205, 214. See also *Walker v. Brooks*, 125 Mass. 241.

These bills appear to have accrued, and most of the services and materials upon which they arose appear to have been rendered and delivered, after the date of the assignment from Bell to Garread.

One of the questions presented by this appeal is whether the court of chancery had jurisdiction to decree payment by the corporation of the city of New York to the respondent of his claim. That it had such jurisdiction seems to be in accordance with reason and the theory of equity jurisprudence.

1. The assignment of Bell to Garread was valid and operative as an agreement, by which Garread and his assigns became entitled to receive payment of the bills in question, when the same should become due, to the amount indicated in the assignment subject to the two prior assignments. It did not operate as an assignment *in presenti* of the choses in action, because they were not in existence, but remained in possibility merely. A possibility, however, which the parties to the agreement expected would, and which afterwards did in fact ripen into an actual reality; upon which, by force of the agreement, an equitable title to the benefit of the bills thus mature and due, became vested in the respondent as assignee of Garread. Story's Eq. Jur. §§ 1040, 1040 *b*, 1055; *Mitchell v. Winslow*, 2 Story's Rep. 630; *Langton v. Horton*, 1 Hare, 549.

It is contended by the counsel for the appellants, that the assignment of Bell to Garread did not pass any interest which was the subject of an assignment, for the reason that there was no contract at the time between Bell and the corporation of the city by which the latter was under any binding obligation to furnish the former with job printing or to purchase of him paper or stationery; and that therefore the interest was of too uncertain and fleeting a character to pass by assignment. There was indeed no present, actual, potential existence of the thing to which the assignment or grant related, and therefore it could not and did not operate *eo instanti* to pass the claim which was expected thereafter to accrue to Bell against the corporation; but it did nevertheless create an equity, which would seize upon those claims as they should arise, and would continue so to operate until the object of the agreement was accomplished. On this principle an assignment of freight to be earned in future, will be upheld and enforced against the party from whom it becomes due. Story's Eq. Jur. § 1055, and authorities there cited; *Langton v. Horton*, and *Mitchell v. Winslow*, *supra*; Story on Bailments, § 294. Whatever doubts may have existed heretofore on this subject, the better opinion, I think, now

is, that courts of equity will support assignments, not only of choses in action, but of contingent interests and expectations and of things which have no present, actual existence, but rest in possibility only, provided the agreements are fairly entered into, and it would not be against public policy to uphold them. Authorities may be found which seem to incline the other way, but which upon examination will be found to have been overruled, or to have turned upon the question of public policy.

2. A bill in equity was the proper remedy for the respondent in this case for the following reasons:

(1) The nature of the claim is one peculiarly of equitable cognizance. It was an equity only in relation to things not yet in possession, or in being, in the nature of a lien, which must be enforced through judicial process before it could be enjoyed, and must therefore of necessity be adjudicated in a court of equity. If the claims of Bell against the city had accrued and been in being at the time of the assignment, and the assignment had been of any specific entire claim, and perhaps if it had been of all claims then due from the city to Bell, the remedy of Garread, his assignee, might, and perhaps in general must, have been at law. But all the cases where the contract has been in relation to things not in existence at the time, and which were in expectancy and possibility merely, show that their adjudication belongs exclusively to a court of equity.

(2) But it seems to me that in this case, independently of the preceding considerations, there were insuperable difficulties in the way of sustaining an action at law. Such action must necessarily have been brought in the name of Bell, who had no interest until after all three of the assignments should be satisfied, of which the one to Garread was the last in the order of time, and was not to be satisfied until the others were provided for. I am aware that, as a general rule, the assignee of a chose in action may use the name of the assignor in an action at law to recover the amount. But it seems to me that the rule should be confined to cases where the whole of an entire demand is assigned to one person or party. Suppose A has an entire demand of \$1000 against B, and assigns to C \$100, to D \$100, and to E \$100, out of the \$1000. Which of the three assignees shall institute an action against the debtor? Suppose we say C shall have the right, how much shall he recover? Shall it be the \$1000? Clearly it must be that, or the residue will be gone, because the demand cannot be split and several ac-

tions sustained for the several parts assigned. But C has no right, nor is he bound to litigate in relation to the parts assigned to D and E, or that part not assigned at all. Here would be four parties, having separate and distinct interests, one having as good right to commence an action, to discontinue it, and to direct in relation to it, as the other; and in case of disagreement, who is to decide? In the case at bar, the plaintiff had no right to sue in Bell's name for what was to be paid under the two first assignments, nor for what would be going to Bell after all three were paid; and he could not carve out just \$1500 and the interest upon it, from the demands due from the city to Bell, without splitting entire demands, which cannot be done. *Smith v. Jones*, 15 John. 229; *Guernsey v. Carver*, 8 Wend. 492; *Stevens v. Lockwood*, 13 Id. 644; Story's Eq. Jur. § 1250.

* * * * *

The notice of the respondent's claims in this case, as appears from the evidence, was served upon the comptroller, while in his office, engaged in the duties thereof, and was beyond all doubt sufficient. Angell and Ames on Corporations, 247.

Upon all the points raised upon the argument, therefore, I am of the opinion that the judgment of the Supreme Court ought to be affirmed.

Judgment affirmed.²²

Assignment of rights by act of the parties: by statute.

ALLEN v. BROWN.

44 NEW YORK, 228.—1870.

Action by plaintiff, as assignee, as for money had and received to the use of plaintiff's assignors. Judgment for plaintiff affirmed at General Term. Defendant appeals.

²² That the assignment of future interests will be enforced in equity, see *Bacon v. Bonham*, 33 N. J. Eq. 614; *Kane v. Clough*, 36 Mich. 436; *Patterson v. Caldwell*, 124 Pa. St. 455; *Edwards v. Peterson*, 80 Me. 367.

That the assignment of part of a demand will be enforced in equity, see *Exchange Bank v. McLoon*, 73 Me. 498; *James v. Newton*, 142 Mass. 636. See also *Trist v. Child*, 21 Wall. 441. That it will not be enforced at law, see *Mandeville v. Welch*, 5 Wheat. 277; *Gibson v. Cooke*, 20 Pick. 15; *Thomas v. Rock Island &c. Mining Co.*, 54 Cal. 578; *Carter v. Nichols*, 58 Vt. 553; *Dean v. St. Paul & D. R. Co.*, 53 Minn. 504.

Defendant collected certain claims for the assignors, but refused to account for the proceeds. The assignors assigned all their interests to the plaintiff, but no consideration was paid by plaintiff.

HUNT, C. The appellant insists that the assignment from Cook, Clark and Cary to the plaintiff conveyed no title upon which this suit could be brought. This point is based upon the evidence given by Mr. Cook, when he testifies, "Allen paid me nothing, and I agreed with him that I would take care of the case, and if he got beat it should not trouble or cost him anything."

I am of the opinion that the assignment is sufficient to sustain this action.

The Code abolishes the distinction between actions at law and suits in equity, and between the forms of such actions. Section 69 [3339]. It is also provided, in section 111 [449], that every action must be prosecuted in the name of the real party in interest, except as otherwise provided in sections 113 [449]. The latter section provides that an executor, administrator, trustee of an express trust, may sue in his own name. These provisions pretended to abolish the common law rule, which prohibits an action at law otherwise than in the name of the original obligee or covenantee, although he had transferred all his interest into bond or covenant to another. It accomplishes fully that object, although others than the assignee may have an ultimate beneficial interest in the recovery. In a case like the present, the whole title passes to the assignee, and he is legally the real party in interest, although others may have a claim upon him for a portion of the proceeds. The specific claim, and all of it, belongs to him. Even if he be liable to another as a debtor upon his contract for the collection he may thus make, it does not alter the case. The title to the specific claim is his. *Durgin v. Ireland*, 4 Kernan, 322; *Williams v. Brown*, 2 Keyes, 486, and cases cited; *Paddon v. Williams*, 1 Robt. R. 340; S. C. 2 Ab. R. N. S. 88.

* * * * *

The judgment should be affirmed with costs.

[Leonard, C., also read for the affirmance.] All for affirmance, except Gray, C., not sitting.

Judgment affirmed with costs.

Assignment of contractual rights and liabilities by operation of law: assignment by lessee of land.

GORDON *v.* GEORGE.

12 INDIANA, 408.—1859.

Appeal from the Madison Court of Common Pleas.

HANNA, J. Sarah George, the appellee, gave a written lease to one Black, stipulating therein that Black should have the use of a parcel of land for five years; in consideration of which Black was to clear the land and make it ready for the plow, and leave the premises in good repair. It was further agreed that Black should build a cabin and smoke-house, and dig a well on the premises, for which Sarah George was to pay twenty-five dollars and thirty-seven cents. Before clearing the land or building the cabin, etc., Black assigned the lease, by indorsement, to the said James Gordon, appellant.

Gordon sued before a justice, alleging that he had built the house and smoke-house and dug the well; that the time had expired, and the lessor refused to pay for said house, etc.

The plaintiff recovered a judgment before the justice for forty-two dollars. On appeal to the Common Pleas, the defendant had a verdict and judgment for twelve dollars.

The defendant, among other things, set up, by way of counter-claim, that the plaintiff had not cleared the ground according to the contract, etc.

The plaintiff asked the court to instruct the jury, that "if the jury find the matters of counter-claim of the defendant exceed the amount which the jury may find due the plaintiff, the jury cannot find against the plaintiff such excess," which was refused. Upon this ruling of the court, the only point made, by brief of counsel, is predicated.

By the statute (2 R. S. p. 120) plaintiff may dismiss his action; but by § 365, "In any case, where a set-off or counter-claim has been presented, which, in another action, would entitle the defendant to a judgment against the plaintiff, the defendant shall have the right of proceeding to the trial of his claim, without notice, although the plaintiff may have dismissed his action, or failed to appear."

So, in *Vassear v. Livingston* (3 Kern. 252) it is said that, "a

counter-claim must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff, if the plaintiff had not sued the defendant."

In *Howland v. Coffin* (9 Pick. 52) it was held by the Supreme Court of Massachusetts, "that the assignee of the lessee is liable to the assignee of the lessor in an action of debt for the time he holds; for though there is no privity of contract, there is a privity of estate which creates a debt for the rent." See authorities cited.

In another case between the same parties, it is said (12 Pick. 125), "the defendant took the term subject to all the advantages and disadvantages attached to it by the terms of the lease. The covenant for the payment of the rent ran with the land, and by the assignment of the term became binding on the defendant." See *Farmers' Bank v. The Mutual Ins. Soc.*, 4 Leigh (Va.), 69; *Taylor's Landlord and Tenant*, 76; *Provost v. Calder*, 2 Wend. 517; 23 Id. 506; 21 Id. 32; *Vernon v. Smith*, 5 Barn. and Adol. 1.

It resolves itself into the question, then, under the above, and § 59, p. 41, of the same statute, and the authorities cited, whether the plaintiff was liable to the defendant for the non-performance of the contract of his assignor. We think, under the circumstances of this case, he was. He became the assignee of the whole interest of Black, before any part of the contract was performed. By receiving an assignment of the lease, and taking possession of the land under it, he surely became liable to perform the stipulations of that lease, so far as they had reference to improvements upon said land, if no others, of which we do not decide, as it is not necessary to do so.

The ruling of the court upon the instruction was correct.

Per Curiam. The judgment is affirmed, with 10 per cent damages and costs.²³

Assignment by lessor of land.

FISHER *v.* DEERING.

60 ILLINOIS, 114.—1871.

MR. JUSTICE WALKER. It appears, from an examination of the

²³ Accord: *Hunt v. Danforth*, 2 Curtis' C. C. Rep. 592; *Salisbury v. Shirley*, 66 Cal. 223. *Thompson v. Rose*, 8 Cowen, 266; *Jackson v. Port*, 17 Johns. 479.

authorities, that at the ancient common law a lease was not assignable so as to invest the assignee with the legal title to the rent. Such instruments were, in that respect, on a footing with other agreements and choses in action. But the 32 Hen. VIII., ch. 34, § 1, declared that the assignee of the reversion should become invested with the rents. But notwithstanding this enactment, the courts held that the assignee of the reversion could not sue for and recover the rent unless the tenant should attorn, when the holder of the reversion might recover subsequently accruing rent in an action of debt. *Marle v. Flake*, 3 Salk. 118; *Robins v. Cox*, 1 Levinz, 22; *Ards v. Watkin*, 2 Croke's Eliz. 637; *Knolles' Case*, 1 Dyer, 5 b; *Allen v. Bryan*, 5 Barn. & Cress. 512, and the note.

In *Williams v. Hayward* (1 Ellis & Ellis, 1040), after reviewing the old decisions on this question, it was, in substance, held that, under the 32 Hen. VIII., an assignee of the rent, without the reversion, could recover when there was an attornment, and that such an assignee could, under the 4 of Anne, recover without an attornment.

The courts seem to have proceeded upon the ground that there could be no privity of contract unless the tenant should attorn to the assignee of the reversion; that, whilst the assignment of the reversion created a privity of estate between the assignee and the tenant, privity of contract could only arise by an agreement between them. Some confusion seems to have got into the books from calling the purchaser of the reversion an assignee of the lease, by its passing by the conveyance as appurtenant to the estate. But where the tenant attorned to the assignee of the reversion the assignment became complete, and then there existed both privity of estate and of contract between the assignee and the tenant, and by reason of the privity of contract the assignee might sue in debt, and recover subsequently accruing, but not rent in arrear at the time when he acquired the reversion.

To give the assignee of the reversion a more complete remedy, the 4 and 5 Anne, ch. 16, § 9, was adopted, dispensing with the necessity of an attornment which the courts had held to be necessary under the 32 Hen. VIII., to create a privity of contract. But this latter act has never been in force in this State, and hence the decisions of the British courts, made under it, are not applicable. In many States of the Union this latter act has been adopted, and the decisions of their courts conform, of course, to its provisions.

But we having adopted the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of, and to supply defects of, the common law, prior to the fourth year of James the First, except certain enumerated statutes, and which are of a general nature and not local to that kingdom, they are declared to be the rule of decision, and shall be considered of full force until repealed by legislative authority. Gross' Comp. 1869, 416. It then follows that the 32 Hen. VIII., ch. 34, § 1, is in force in this State, as it is applicable to our condition, and is unrepealed. And we must hold, that the construction given to that act by the British courts was intended also to be adopted.

The facts in this case show such a privity of contract as brings it fully within the rule announced in the above cases. Appellee paid to appellant several instalments of rent falling due under the lease after it was assigned to him. By paying the rent, the lessee fully recognized the appellant as his landlord, and created the necessary privity of contract to maintain the action.

The case of *Chapman v. McGrew* (20 Ill. 101) announces a contrary doctrine. In that case this question was presented, and notwithstanding the lessee had fully recognized the assignee of the lease as his landlord, it was held that the lessor of the premises might maintain an action to recover the rent. In that case, the fact that the lessee had attorned to the assignee was given no weight, and the fact that such privity was thereby created as authorized the assignee of the lease to sue for, and recover the rent, was overlooked. In that, the decision was wrong. The right of action could not be in both the lessor and his assignee, and the privity thus created gave it to the latter.

The subsequent case of *Dixon v. Buell* (21 Ill. 203) only holds that such an assignee, whether he holds the legal or equitable title to the lease, may have a claim for rent growing out of the lease, probated and allowed against the estate of the lessee. That case has no bearing on the case at bar.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.²⁴

²⁴ The remedy has since been extended to the grantee without attornment. Ill. R. S. ch. 80, §14. Cf. *Crawford v. Chapman*, 17 Ohio St. 449.

Assignment of covenants affecting freehold interests.**SHABER v. ST. PAUL WATER CO.**

30 MINNESOTA, 179.—1883.

Action for breach of covenant. Demurrer to complaint overruled. Defendant appeals.

BERRY, J. In January, 1869, John R. Irvine and Nancy Irvine owned certain land (in the city of St. Paul) through which ran Phalen Creek, affording a valuable mill privilege thereon. Leonard Schiegel, as the lessee of the Irvines, had constructed a dam and race upon the land, by which the mill privilege was utilized in the running of a flour mill, which he had also erected thereon and was operating. By sundry subsequent conveyances the land, with the race, dam, mill, and privilege, came to Henry Shaber, the plaintiff's intestate, and the same are now part of his estate. The defendant corporation, the St. Paul Water Company, was formed to supply the city of St. Paul with water. In January, 1869, the company, in carrying out this purpose of its creation, was about to tap Lake Phalen and lay pipes by which to divert and draw off the water thereof. Phalen Creek flows from Lake Phalen, which is the last and lowest of a chain or series of lakes, constituting a local water system. The Irvines and Schiegel objected to the proposed diversion of water, refused to permit it, and threatened to enjoin it, because, unless provision was made for bringing into Lake Phalen, from other sources and by artificial means, as much water over and above what naturally flowed into the same as the company should at any time draw out, the level of the lake would be lowered, the quantity of water flowing into the creek diminished, and the mill privilege impaired and destroyed.

To remove the opposition, and to induce them to refrain from enjoining its proceedings, the company entered into a written agreement, by which, "for a good and valuable consideration," it covenanted and agreed with the Irvines and Schiegel, "their heirs and assigns, severally and separately," that it would make certain specified "improvements," such as dams, gates, canals, and channels, all within one year from the 8th day of February, 1869; that it would at all times thereafter keep and maintain the same in a "good, strong, and substantial manner," and that it would do and

refrain from doing certain other things, all having reference to maintaining the supply of water in the creek; and further, that the volume of water flowing out of Lake Phalen through Phalen Creek should never at any time be diminished or rendered less available for the purpose of the water-power mill privilege before mentioned, by any work or operation of the company, than it had been before it commenced its operations; that it would never draw or take out of the lake at any time any more water than such quantity as it should introduce into the same by its said improvements and by artificial means over and above the quantity which naturally flowed into the same; and that it would by its said improvements and by artificial means, introduce and lead into the lake at all times as large a volume of water as it should draw out, in addition to what flowed into the lake through natural channels. The plaintiff alleges that defendant has failed to make the specified "improvements," and that it has broken its covenants in reference to maintaining the stage and quantity of water in the creek, and that, in consequence of said failure and breaches, the flow of water in the creek has been diminished by the drawing and diverting of water by defendant from Lake Phalen, and thereby the said Shaber, in his lifetime, and his estate since his decease, has been greatly damaged (as particularly set forth) in respect to the mill, water privilege, and the use and operation of the same, and that he and his estate have been subjected to great expense and loss on account thereof. This appeal is taken from an order overruling defendant's general demurrer to the complaint.

Our examination of the case has brought us to the conclusion that the appeal presents a single question, viz.: Whether any of the covenants entered into by defendant run with the land of the covenantees to Shaber and his estate? This is a pure common law question, to be decided upon the authorities.

We think the following propositions embody the rules of law applicable to the case, and that they are supported by the authorities cited: A covenant runs with land when either the liability to perform it, *i. e.*, its burden, or the right to take advantage of it, *i. e.*, its benefit, passes to the assignee of the land. *Savage v. Mason*, 3 Cush. 500; 1 Smith's Lead. Cas. 120.

To enable a covenant to run with land so as to give the assignee its *benefit*, the covenantee must be the owner of the land to which the covenant relates; but the covenantor may be either a person in privity of estate with the covenantee, or a stranger; while, with

reference to the subject of the covenant, it is sufficient that it be for something to be done, or refrained from, about, touching, concerning, or affecting the covenantee's land (though not upon it), if the thing covenanted for be for the benefit of the same, or tend to increase its value in the hands of the holder. *Spencer's Case* and notes, Eng. & Amer.; 1 *Smith Lead. Cas.* (7th Am. ed.) 115, where all the learning upon the subject appears to be collected; *Pakenham's Case*, 42 Edw. III. 3, abstracted in 1 B. & C. 410, 415; *Anson on Contracts*, 220; *Pollock on Contracts*, 219; *Rawle on Covenants*, 334, and notes; *Norman v. Wells*, 17 Wend. 136; *Norfleet v. Cromwell*, 70 N. C. 634; 1 *Smith Lead. Cas.* 122, 124, 139, 140, 175, 177, 181, 183; *Allen v. Culver*, 3 Denio, 284; *Van Rensselaer v. Smith*, 27 Barb. 104, 146; *National Bank v. Segur*, 39 N. J. Law, 173.

The case at bar is controlled by these principles. The Irvines—the covenantees—were the owners of the land to which the defendant's covenants related; that is to say, they owned the mill site upon which was the water privilege which it was the object and purpose of the covenants to preserve and protect; and the covenants were for something to be done, and to be refrained from, about, touching, concerning, and affecting the covenantee's land, for the benefit thereof, and tending to increase its value in the hands of the holder. The covenants were of a character to run with the land, so as to enable the assignee of the covenantees to take advantage of them. When it is considered what it was that the water company proposed to do, and for what purpose the covenants were made, it would be astonishing if this were not the case. The diverting the water of Lake Phalen, without provision for counteracting it, would be a perpetual injury to the land of the covenantees. No protection against such an injury would be adequate unless it was also perpetual. That nothing less could have been fairly intended by the parties to the covenants is apparent from the allegations of the complaint.

It is insisted by defendant that the breach of the covenants was complete before plaintiff had acquired any interest in the property to which they related; that it had become a right of action, and did not pass to the plaintiff. If the covenants to make the specified improvements within a year from February 8, 1869, were all the covenants entered into, this point might possibly be well taken. But such is not the case. These improvements are not only to be made, but at all times thereafter to be kept and maintained in a

"good, strong, and substantial manner," and the volume of water flowing out of Lake Phalen through the creek is to be maintained undiminished by any of the operations of the defendant, with other covenants of similar import. These are, therefore, continuing covenants, and for that reason, and because they run with the land, the damages from their breach accrue to him who holds the property when the breach occurs—or, in other words, to the person injured—and to him the right of action therefor necessarily belongs. *Jeter v. Glenn*, 9 Rich. (S. C.) Law, 374. In this respect they are analogous to covenants for quiet enjoyment and warranty, which inure to the protection of the owner for the time being of the estate which they are intended to assure. Rawle on Covenants, 352, and citations. The covenants relating to the making of the specified "improvements" provide for the means by which a certain result is to be accomplished, while these continuing covenants provide for the result itself. The latter are, therefore, the most important, because they do to the substance rather than the form in which the result in view is to be accomplished. If the continuing covenants are kept, the damages for the breach of the others would be comparatively, if not altogether, nominal. For these reasons we are of opinion that the complaint states a cause of action, and that the demurrer was, therefore, properly overruled. We have not overlooked the case of *Kimball v. Bryant* (25 Minn. 496), though we have not before adverted to it, as it was not cited or alluded to upon the argument. But it seems to us that the principle of the decision there made may have an important bearing upon the case at bar. and in support of the conclusions to which we have arrived.

Order affirmed.²⁵

²⁵ In *Mott v. Oppenheimer* (135 N. Y. 312), it is held that a covenant by one landowner for himself, his heirs, or assigns, to pay for one-half a party wall erected by an adjoining owner whenever he or they should make use of it, coupled with a further provision that the agreement should be construed as covenants running with the land, imposes a *burden* on the land of the covenantor and a *benefit* on the land of the covenantee which run with the land of each into the hands of grantees.

Where there is no express stipulation that the covenant to pay for a party wall shall run with the land, it will be construed as a personal covenant. *Cole v. Hughes*, 54 N. Y. 444; *Scott v. McMillan*, 76 N. Y. 144; *Bloch v. Isham*, 28 Ind. 37. But the covenant to pay for future repairs runs with the land. *Hart v. Lyon*, 90 N. Y. 663.

INHABITANTS OF MIDDLEFIELD v. CHURCH MILLS
KNITTING CO.

160 MASSACHUSETTS, 267.—1894.

Contract, to recover expenses incurred in repairing a bridge which defendant was bound to repair. Demurrer by defendant sustained. Plaintiff appeals.

The declaration alleged that the owners of land on a stream wishing to raise the stream into a pond for water-power changed and raised the highway and built a new bridge and approaches under an arrangement with plaintiff whereby the owners covenanted for themselves and successors to keep the same in repair; that the owners had for many years kept the same in repair; that defendant was now the owner of said land, pond, and water-power, and had succeeded to said prior owners' rights and obligations, but had failed and refused to keep the bridge in repair; that plaintiff had of necessity repaired the same, but defendant had refused to repay plaintiff the cost thereof.

HOLMES, J. This is an action to recover the amount of damages which the plaintiff has been compelled to pay in consequence of a breach of a duty alleged to rest primarily on the defendant. The declaration is not in covenant, to speak in terms of the old forms of action, but in assumpsit, on the principle of *Lowell v. Spaulding* (4 Cush. 277), *Woburn v. Henshaw* (101 Mass. 193), and other cases of that class. The mode in which the defendant's duty originated, whether by prescription (*Regina v. Bucknall*, 2 Ld. Raym. 804; Bac. Abr. Highways [E.]; Angell & D. Highways, § 255), or by grant or covenant having the effect of a grant (*Bronson v. Coffin*, 108 Mass. 175; *Norcross v. James*, 140 Mass. 188, 190; *Ladd v. Boston*, 151 Mass. 585, 588), or otherwise (*Perley v. Chandler*, 6 Mass. 454, 457, 458; *Lowell v. Proprietors of Locks and Canals*, 104 Mass. 18), is one step more remote than when the declaration is on the covenant directly. However it might be in the latter case, we are of opinion that the duty is sufficiently alleged for the purposes of the case at bar. See *Bernard v. Cafferty*, 11 Gray, 10, 11; form of declaration for obstructing way, Pub. Sts., c. 167, § 94.

It is true that, in order to overrule the demurrer, we have to assume the possibility that the defendant might be bound as assign

and tenant of a quasi servient estate to perform an active duty created by its predecessor in title; but in view of the foregoing and other decisions, we are not prepared to deny that it might be bound in law or in equity so far as to make it liable to indemnify the plaintiff to the extent of simple damages. It is true, that, in general, active duties cannot be attached to land, and that affirmative covenants only bind the covenantor, his heirs, executors, and administrators. But there are some exceptions, and most conspicuous among them is the obligation to repair fences and highways. We do not deem it advisable to discuss the law in detail until the facts shall appear more exactly than they do at present. If such a duty can be attached to land, then, although ordinarily the corresponding right could not exist in gross, yet in the case of a way which a town is bound to keep in repair for the benefit of the public, the town is the natural and convenient protector of the obligation, and, being immortal and locally fixed, may enforce a covenant originally made to it without being shown to be strictly the owner of the highway as a quasi dominant estate, just as, conversely, a local corporation was bound to the terre-tenant to perform active services in *Pakenham's case*, Y. B. 42 Edw. III., 3, pl. 14.

Demurrer overruled.

Assignment of contractual obligation by death.

DICKINSON v. CALLAHAN'S ADM'RS.

19 PENNSYLVANIA STATE, 227.—1852.

Assumpsit and covenant for lumber delivered by the administrators of Calahan to the executors of Dickinson to apply on a contract made between Calahan and Dickinson. Defense, breach of contract in not delivering the full amount called for by such contract. Verdict for plaintiffs for full amount of claim.

LOWRIE, J. It seems to us very doubtful whether the oral contract could be rightly proved by the evidence that was submitted to the jury. But admit that it could. The one party, a lumber manufacturer, agreed to sell to the other, a lumber merchant, all the lumber to be sawed at his mill during five years, and that the

quantity should be equal on an average to 300,000 feet in a year, without stipulating for any given quantity in any one year, and the lumber was to be paid for as delivered. Before the five years had expired, both parties died; and now the representatives of the vendee seek to hold those of the vendor bound to perform the contract, and to set off damages for the breach of it against a claim for part of the lumber delivered.

It will be seen that, in thus stating the question, we set aside the alleged breach in the lifetime of Calahan; and we do this because the court properly instructed the jury that, under such a contract, Calahan was guilty of no breach in not manufacturing the full average quantity in his lifetime, and left it to them to say whether in his lifetime he had committed any other manner of breach. The point in controversy may be stated thus: Where a lumber manufacturer contracts with a lumber merchant to sell him a certain quantity of lumber, to be made at his mill during five years, for which he is to be paid as the lumber is delivered, and he dies before the time has elapsed, are his administrators bound to fulfill the contract for the remainder of the time?

No one can trace up this branch of the law very far without becoming entangled in a thicket, from which he will have difficulty in extricating himself. Very much of the embarrassment arises from the fact that the liability of executors and administrators has been often made to depend more upon the forms of action than upon the essential relations of the parties, as will be seen by reference to the books. Platt on Covenants, 453; 2 Wms. Executors, 1060; and Viner's Ab., titles "Covenants," D. E., and "Executors," H. a.; Touchstone, 178. The simplicity and symmetry of the law would certainly be greatly increased, and its justice better appreciated if in all cases where the law undertakes the administration of estates, as in cases of insolvency, bankruptcy, lunacy, and death, the rules of distribution were the same.

The contract in this case established a defined relation, a relation depending for its origin and extent upon the intention of the parties. The question is, do the administrators of a deceased party succeed to that relation after the death of the party, or was it dissolved by that event? On this question the books give us an uncertain light. In *Hyde v. Windsor* (Cro. Eliz. 552) it is said that an agreement to be performed by the person of the testator, and which his executor cannot perform, does not survive. But here the uncertainty remains, for the acts which an executor cannot perform

are undefined. It recognizes the principle, however, that an executor does not fully succeed to the contract relations of his testator.

The case of *Robson v. Drummond* (2 Barn. & Adol. 303, 22 Eng. C. L. Rep. 81) is more specific; for in that case it was held that an agreement by a coachmaker to furnish a carriage for five years and keep it in repair, was personal and could not be assigned, and executors and administrators are assigns in law (Hob. 9 b. Cro. Eliz. 757; Latch. 261; Wentw. Executors 100); that being a general term, applying to almost all owners of property or claims, whether their title be derived by act of law or of the parties. And it is no objection that one may take as executor or administrator in certain cases where the English laws of maintenance and forms of action would not allow him to take as assignee in fact, for those laws do not extend to such a case, and they have no application here.

In *Quick v. Ludburrow* (3 Bulst. 29) it is said that executors are bound to perform their testator's contract to build a house, but the contrary is said in Wentw. Executors, 124, Vin. Ab. "Covenant," E., pl. 12, to have been declared in *Hyde v. Windsor*, though we do not find it in the regular reports of the case. 5 Co. 24; Cro. Eliz. 552. But these are both mere *dicta*. The same principle is repeated in Touchstone, 178, yet even there a lessee's agreement to repair is not so construed; and in Latch Rep. 261, the liability of executors on a contract to build is for a breach in the testator's lifetime. In *Cooke v. Colcraft* (2 Bl. Rep. 856), a covenant not to exercise a particular trade was held to establish a mere personal relation and not to bind executors; and the contrary is held in *Hill v. Hawes*, Vin. Ab., title "Executors," Y. pl. 4. And so executors and administrators stand on the same footing with assignees in fact with regard to apprentices; and contracts of this nature are held not to pass to either, because they constitute a mere personal relation, and are, therefore, not transferable; 2 Stra. 1266; 4 Ser. & R. 109; 1 Mass. 172; 19 Johns. 113; 1 Rob. 519; 12 Mod. 553, 650; 5 Co. 97.

The case most nearly resembling this is *Wentworth v. Cock* (10 Ad. & El. 42, 37 Eng. C. L. R. 33), where a contract to deliver a certain quantity of slate, at stated periods, was held to bind the executors. This case was decided without deliberation, and with but little argument on the part of the executors. The plaintiff relied on the case of *Walker v. Hull* (1 Lev. 177), where executors were held bound to supply the place of the testator in teaching an ap-

prentice his trade. But that case had long ago been denied in England (2 Stra. 1266), and is rejected here. *Commonwealth v. King*, 4 Ser. & R. 109. This last case treats the contract as a mere personal one, that is dissolved by death, and regards as absurd the doctrine in *Wadsworth v. Guy* (1 Keb. 820, and 1 Sid. 216), that the executors are bound to maintain the apprentice, while he is discharged from duty.

But the authority principally relied on by the counsel in *Wentworth v. Cock*, is the Roman law, Code Just. 8, 38, 15, and the commentary on it in 1 Pothier on Oblig. 639. Yet there are few subjects in the Roman law wherein its unlikeness to ours is more marked than in the matter of succession to personal estate, and therefore its example herein is almost sure to mislead. The difference is sufficiently indicated, when we notice that the Roman executor was in all cases either the testamentary or the legal heir, and if he accepted the estate he was considered as standing exactly in the place of the decedent, and was of course bound for all his legal liabilities, including even many sorts of offenses, whether the estate was sufficient or not. He was bound as heir and by reason of the estate given to him, and not as one appointed to settle up the estate. If the heir was unwilling to accept the estate upon these terms, it became vacant, and the prætor appointed curators to administer for the benefit of all. It would seem strange that such curators should be bound to carry on the business of the deceased, where they are appointed to settle it up; yet how it really was does not appear. Dig. 427. Our statute recognizes the duty of the executor and administrator to pay all debts owing by the deceased at the time of his death, and this is the common principle. In another clause it makes the executor and administrator liable to be sued in any action, except for libels and slanders and wrongs done to the person, which might have been maintained against the decedent if he had lived. But this furnishes us no aid in this case, and was not intended to. Its purpose is to enlarge and define the rights of action, which, existing against the individual, should survive against his estate. Not contract relations and duties, but remedies for injuries already done, are declared to survive. If the decedent committed no breach of contract, he was liable to no action when he died, and this law cannot apply.

We are then without any well-defined rule of law directly applicable to this case, and are therefore under the necessity of deducing the rule for ourselves. The elements from which this de-

duction is to be made are the contract itself, the ordinary principles and experience of human conduct, the decisions in analogous cases, and the nature of the office of administrator.

We repeat the question: Does such a contract establish anything more than a personal relation between the parties? This is a mere question of construction, depending upon the intention of the parties (Hob. 9; Yelv. 9; Cro. Jac. 282; 1 Bing. 225; 8 Eng. C. L. R. 307) unless the intention be such as the law will not enforce. Is it probable that either party intended to bind his executors or administrators to such a relation? The contract does not say so, and we think it did not mean it; for it would involve the intention that the administrators of one shall be lumber merchants and those of the other sawyers. The character of the contract demands not such a construction; for each delivery under it is necessarily of complete and independent articles, and each delivery was to be at once a finished work on each side. There may be cases when it is necessary that the executor or administrator shall complete a work already begun by the decedent, and then they may recover in their representative character. 1 Crompt. & Mees. 403; 3 Mees. & W. 350; 2 Id. 190; 3 W. & Ser. 72. But here every act of both parties was complete in itself. From the contract itself, and from the ordinary principles of human conduct, we infer that neither party intended the relation to survive.

A contrary view is incompatible, in the present case, with the office of administrator; for it would require him to have the possession of the saw mill in order to fulfill the contract; and yet administrators have nothing to do with the real estate, unless the personal estate is insufficient to pay the debts, and therefore they cannot perform. It is incompatible with the general duties of administrators, in that it would require them to carry on the business left by the decedent, instead of promptly settling it up; it would require him to satisfy claims of this character within a year, or begin to do so, while the law forbids him to do so except at his own risk; and it might hang up the estate to a very protracted period. We are therefore forbidden to infer such an intention, and possibly to enforce it even if it appeared.

The inference is further forbidden by the spirit of analogous cases. It would seem absurd to say that the administrator of a physician, or author, or musician could be compelled to perform their professional engagements, no matter how the contract might be expressed. The idea is ludicrous. Yet it has been supposed that

an administrator might take the place of his intestate in teaching an apprentice to be a surgeon, or saddler, or shoemaker, or mariner, or husbandman, or in demanding services from an ordinary laborer; but the idea was rejected by the court. On what ground? Most certainly not that no one else could be got to take the place of the decedent; but on the ground that no such substitution was intended by the contract, together perhaps with the feeling of the incompatibility of such a substitution with the duties imposed by law upon administrators. The law trusts people to settle up estates on account of their honesty and general business capacity, and not for any peculiar scientific or artistic skill, and the State does not hold itself bound to furnish such abilities. Some people may suppose that it requires no great skill to manufacture boards, if one has the material and machinery; but still we cannot suppose that the deceased was contracting for any kind of skill in his administrators. For these reasons the court below was right in declaring in substance, that the administrators were liable only for breaches committed by the intestate in his lifetime, and the same principle applies to the death of either party. These views set aside some of the exceptions as entirely unimportant, and in the others we discover no error, and no principle that calls for any special marks. Judgment affirmed.²⁶

ENGINEERING CASES: EXCERPTS FROM DECISIONS.

ASSIGNMENT.

A contract involving street improvement may be assigned. The assignee may recover on it if he meets the terms and conditions specified. *Taylor v. Palmer*, 31 Cal. 241.

A contract to lay a gravel roof with a guarantee to last for a

²⁶ See *Lacy v. Getman*, 119 N. Y. 109 (contract of service); *Wade v. Kalbfleisch*, 58 N. Y. 282; *Chase v. Fitz*, 132 Mass. 359. *Allen v. Baker*, 86 N. C. 91 (breach of contract of marriage); *Siler v. Gray*, 86 N. C. 566 (contract to care for and support another). *Janin v. Browne*, 59 Cal. 37. See also *Adams Radiator & Boiler Co. v. Schnader*, 155 Pa. St. 394.

For cases indicating a less stringent rule than that applied in the principal case, see *Drummond v. Crane*, 159 Mass. 577; *Billings' Appeal*, 106 Pa. St. 558.

specified time is assignable. *Curran v. Clifford*, 40 Pac. Rep. 477 (Col.).

The assignor of a contract to build a structure for a city does not give an implied warranty that the contract is valid, and if it proves not to be valid the assignee cannot avoid paying notes given in consideration of the assignment. *Gould v. Bourgeois*, 51 N. J. L. 361.

A contract to drill an oil-well may be sub-let or assigned. *Galey v. Mellon*, 33 Atl. Rep. 560.

If the lien of a mechanic for services or of a material-man for materials used in a structure is perfected, it may be assigned to another. *Milwaukee Mechanics' Ins. Co. v. Brown*, 44 Pac. Rep. 35.

If a contract is between a city and a corporation, "its successors and assigns," for erecting waterworks and furnishing water to the city, it is assignable by the corporation. *Carlyle L. W. & P. Co. v. City of Carlyle* (Ill. Sup.), 29 N. E. Rep. 556.

One who has contracted to perform work which requires skill and science cannot impose another in his place without consent of the other party. *Munsell v. Temple*, 3 Gillman 93; *Haskell v. Blair*, 3 Cush. (Mass.), 534.

A contract to do work on a street can be assigned, and if the assignee fulfills the conditions of the contract he can enforce it and recover the contract price. *Taylor v. Palmer*, 31 Cal. 241.

The assignment of a contract for cleaning streets is not against public policy as long as the city retains the personal obligation of the original contractor and his sureties. *Devlin v. Mayor et al.*, 63 N. Y. 8 (1875).

A contract to put on a gravel roof, to be done in first-class shape and guaranteed for a certain time, and a contract to drill an oil-well have been held to be such contracts as might be sublet or assigned, when it was shown that the contractor was not specially fitted to do the work nor was employed on account of his knowledge, experience or pecuniary ability. *Carran v. Clifford* (Colo. App.), 40 Pac. Rep. 477; *Galey v. Mellon* (Pa. Sup.), 33 Atl. Rep. 560.

Where the assignees of a contract to construct a railway agree to save the assignor unharmed from all liability by reason of sub-contracts previously let by him, a failure to pay the amounts due on such subcontracts is a breach by the assignees for which the assignor can recover without first showing payment by himself. *Mills v. Allen*, 10 Sup. Ct. Rep. 413.

An assignment of money due and to become due on a building

contract effects an immediate and present transfer to the assignee of a right to demand and receive the money assigned without notice to the debtor. *Board of Education v. Duquesnet* (N. J. Ch.), 24 Atl. Rep. 922; *Union Pac. Ry. Co. v. Douglas Co. Bank* (Neb.), 60 N. W. Rep. 886.

The engineer of a bridge who is a share-holder in a bridge firm cannot maintain an action against his firm, being himself a partner. *Money Penny v. Hartland*, 1 Car & Payne 352.

If a contract makes the money which is due upon it payable to the contractor or his assigns, or to his heirs or executors, the personal representative may recover without even averring that the money has not already been paid to the heirs. 7 Amer. & Eng. Ency. Law 262.

If a house is to be completed before a certain time, the contractor's executor or administrator is bound to perform the contract, or to enforce its performance on the part of the owner. The heir cannot enforce its performance even if the profits are partly in lands. *Crans v. Kans. Pac. R. Co.*, 131 U. S. 168 (1879).

A contract to build a lighthouse was held to be discharged by the death of the contractor, on the ground that its erection was a matter of personal skill and science. *Wentworth v. Cock*, 10 A. & E. 45.

If the important consideration in the employment of a contractor or builder was his skill and proficiency, and this can be proved, then the contract cannot be performed by the executor, administrator or assignee. *Robinson v. Davidson*, L. R. 6 Exch. 269.

If the contract is not founded upon personal relations, or does not require personal skill, it survives to the executor or administrator, and the estate may be held liable for a breach committed after as well as before the death of the contractor. *Cooper v. Jarman*, L. R. 3 Eq. 98; 7 Amer. & Eng. Ency. of Law 326.

A contract to do certain repairs on a building for a specific sum is not a personal contract which is terminated by the death of the owner, but the contractor may recover of the administrator for work done thereunder after the death of the owner. *Russell v. Buckhout*, 34 N. Y. Sup. 271.

Ordinary contracts for engineering and architectural work pass to the contractor's legal representatives, who take the burdens as well as the benefits. *Wentworth v. Cock*, 10 A. & E. 45.

When a contractor assigns his contract with a city to build a structure, it seems that there is no implied warranty on his part

of its validity, and if it turns out to be invalid and worthless the assignee cannot avoid the payment of notes he has given in consideration of such assignment, there being no misrepresentation, concealment or fraud on the part of the contractor.

Moneys not yet earned, but expected to be earned in the future under an existing contract, may be assigned. *Perkins v. Butler Co.* (Neb.), 62 N. W. Rep. 308; *Tracy v. Waters* (Mass.), 39 N. E. Rep. 190.

The lien of a mechanic or material-man may be assigned. *Milwaukee Mechanics' Ins. Co. v. Brown* (Kans. App.), 44 Pac. Rep. 35.

CHAPTER IV.

THE CONTRACT: ITS INTERPRETATION.

The next subject for consideration is the interpretation of the contract, or the manner in which the courts deal with it. The proof of the terms of the agreement is taken up, and the extent to which parol evidence is admitted to modify written documents is considered.

This chapter naturally divides itself into the principles concerning evidence and those concerning construction. Under evidence we consider the sources from which we may gather the expressions of the intent of the parties. Under construction we consider the rules which are applied to interpret this intent from the expressions which the parties have manifested.

SECTION I.

EVIDENCE.

"Evidence is that which tends to prove or disprove any matter in question, or to influence the belief respecting it. Belief is produced by the consideration of something presented to the mind. The matter thus presented, in whatever shape it may come, and through whatever material organ it is derived, is evidence." Prof. Parker, Dartmouth College.

The evidence essential to determine the intent of the parties to contract or not is of three kinds:

- (A) The evidence to prove the existence of the instrument.
- (B) The evidence to prove that the instrument is a contract.
- (C) The evidence to prove its terms.

The difference between a formal and a simple contract should be noted. In the first case the instrument under seal is the contract. In the second, the document not under seal is not the contract itself, but only evidence of it. A contract under seal gets its validity from its form, hence if the instrument is proved the contract is proved. In a simple contract, more than the writing may be

necessary to prove the contract; spoken words and acts may also be essential.

(A) *Evidence to prove the instrument.*

1. Evidence of the acts of sealing and delivery are sufficient to prove a contract under seal.

2. In a simple contract, evidence is required to prove that the party being sued is the one who made the contract. Parol evidence is sufficient.

3. Where a contract is partly written and partly oral, then oral evidence must be introduced to supplement the written part.

4. Parol evidence may be introduced to connect the several papers which constitute a contract where such connection is not apparent.¹

5. If the Statute of Frauds applies to a contract requiring a written memorandum, then in order to use parol evidence the documents must be connected by a reference in one or both to the other.²

(B) *Evidence to prove that the instrument is a contract.*

1. Parol evidence is admissible to show that an instrument is not a valid contract, either for lack of consideration, capacity of parties, legality of object or consent.

2. If the operation of a contract is put off by a parol condition, extrinsic evidence may be admitted to show it.

3. Parol evidence cannot be introduced to vary the terms of a written agreement, but it may be admitted to prove that there is no agreement at all.³

(C) *Evidence to prove the terms of the instrument.*

"According to the general law of England the written record of a contract must not be varied or added to by verbal evidence of what was the intention of the parties." Anson Contr. p. 319.

To this rule there are four exceptions:

(a) in cases where terms are proved supplementary or collateral to so much of the agreement as is in writing;

¹*Isaacs v. Smith*, 55 N. Y. Super. Ct. 446 (1888); *Colby v. Dearborn*, 59 N. H. 326; *Wilson v. Tucker*, 10 R. I. 578.

²*Coe v. Tough*, 116 N. Y. 273; *O'Donnel v. Leeman*, 43 Me. 158.

³*Reynolds v. Robinson*, 110 N. Y. 654; *Westman v. Krumweide*, 30 Minn. 313; *Glewitt v. Boorum*, 142 N. Y. 357.

(b) in cases where explanation of the terms of the contract is required;

(c) in the introduction of usages into the contract;

(d) in the application of special equitable remedies in the case of mistake.

(a) *Supplementary or collateral terms.*

1. Where the contract is partly oral and partly written, evidence of the supplementary terms may be admitted to complete the document, but not to vary it.⁴

2. Where there is an oral collateral agreement which modifies the contract, though not expressed in it, such as a condition precedent to its performance, evidence may be admitted to prove it if it is not contrary to the written agreement.⁵

(b) *Explanation of the terms.*

1. Evidence as to the identity of the parties,⁶ descriptive of the subject-matter⁷ or of responsibility assumed,⁸ is proper if given by way of explanation.⁹

2. If evidence given in explanation reveals the fact that the parties have given the same terms different meanings, then the contract is voidable for mistake.¹⁰

(c) *Introduction of usages.*

1. Parol evidence is admissible to prove the usage of a trade or locality, thus giving some of the terms of the agreement special meanings,¹¹ or possibly annexing a term¹² to give effect to the intent of the parties.

⁴ *Wood v. Moriarty*, 15 R. I. 518; *Chapin v. Dobson*, 78 N. Y. 74; *Wood Mowing Co. v. Gaertner*, 55 Mich. 453.

⁵ *Van Brunt v. Day*, 81 N. Y. 251; *Naumberg v. Young*, 44 N. J. L. 331; *Thurston v. Arnold*, 43 Iowa 43.

⁶ *Byington v. Simpson*, 134 Mass. 169; *Andrews v. Dyer*, 81 Me. 104.

⁷ *Clark v. Coffin Co.*, 125 Ind. 277; *Bulkly v. Devine*, 127 Ill. 406; *Doane College v. Lanham*, 42 N. W. Rep. (Neb.) 405 (1889).

⁸ *Isaacs v. Smith*, 55 N. Y. Super. Ct. 446 (1888); *Manchester Paper Co. v. Moore*, 104 N. Y. 680; *Ganson v. Madigan*, 15 Wis. 144.

⁹ *Coleman v. Man. Imp. Co.*, 94 N. Y. 229; *Howard v. Pepper*, 136 Mass. 28; *Bennett v. Pierce*, 28 Conn. 315.

¹⁰ *Hazard v. New England Marine Ins. Co.*, 1 Sumner (U. S. C. C.) 218.

¹¹ *Walls v. Bailey*, 49 N. Y. 464; *Soutier v. Kellerman*, 18 Mo. 509.

¹² *Cooper v. Kane*, 19 Wend. (N. Y.) 386.

2. Expert evidence may be introduced to explain terms pertaining to technical matters contained in the contract.¹³

3. Evidence concerning usage, brought forward to define a contract, must satisfy these two conditions: it must be in harmony with the rules of common law and the statutes, and it must accord with the provisions of the contract.¹⁴

(d) *Application of equitable remedies.*

The admission of extrinsic evidence is freer in the matter of equitable remedies, the granting or refusal of specific performance, the correction of documents or their revocation.

1. If a mistake is proved, such as the making of an inadvertent offer, it is a ground for refusing specific performance.

2. Parol evidence is not admissible to enlarge a conveyance, but may be taken to reduce it.¹⁵

5. Where the mistake is not mutual, and one party is seeking to profit by it, extrinsic evidence is heard for the purpose of offering such a party the choice of a corrected contract or the cancellation of the present one.

CASES.

CHAPTER IV.—INTERPRETATION.

SECTION I.—EVIDENCE.

Proof of document.

COLBY *v.* DEARBORN *et al.*

59 NEW HAMPSHIRE, 326.—1879.

Writ of entry.

CLARK, J. Both parties claim title to the demanded premises under Kimball C. Prescottt. The plaintiff's title is derived from a levy founded on an attachment made June 24, 1873. The defendants are in possession, claiming title under a mortgage,

¹³ *Welsh v. Hackestein*, 152 Pa. St. 27.

¹⁴ *Myers v. Sarl*, 30 L. J. Q. B. 9; *Mallan v. May*, 13 M. & W. 517.

¹⁵ *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585; *Glass v. Hulbert*, 102 Mass. 24.

executed by Prescott, February 14, 1873, and recorded February 20, 1873, more than four months prior to the date of the plaintiff's attachment; and therefore if the mortgage is valid, the defendants are in possession under a title prior to the plaintiff's. The plaintiff contends that the mortgage is void for uncertainty in the description of the note secured by it, the amount of the note not being stated in the condition of the mortgage. The consideration of the mortgage is \$400, and the condition is the payment of a note of even date with the mortgage, payable in four months from date, with interest. The court received parol evidence showing that the note intended to be secured by the mortgage was a note for \$400 bearing the same date as the mortgage, and payable in four months from date, with interest. This evidence was rightfully received. *Benton v. Sumner*, 57 N. H. 117; *Cushman v. Luther*, 53 N. H. 563; *Bank v. Roberts*, 38 N. H. 23; *Melvin v. Fellows*, 33 N. H. 401; *Boody v. Davis*, 20 N. H. 140. The mortgage being valid, there must be

Judgment for the defendants.¹⁶

Evidence as to the fact of an agreement.

REYNOLDS *v.* ROBINSON *et al.*

110 NEW YORK, 654.—1888.

Action for damages for breach of an alleged contract for the purchase by plaintiff, and sale by defendants, of a quantity of lumber. Judgment for defendants reversed at General Term. Defendants appeal.

ANDREWS, J. The finding of the referee, which is supported by evidence, to the effect that the contract for the purchase and sale of the lumber on credit, contained in the correspondence between the parties, proceeded upon a contemporaneous oral understanding that the obligation of the defendants to sell and deliver was contingent upon their obtaining satisfactory reports from the commercial agencies as to the pecuniary responsibility of the plaintiff, brings the case within an exception to the gen-

¹⁶ Accord: *Wilson v. Tucker*, 10 R. I. 578.

eral rule that a written contract cannot be varied by parol evidence, or rather it brings the case within the rule, now quite well established, that parol evidence is admissible to show that a written paper which, in form, is a complete contract, of which there has been a manual tradition, was, nevertheless, not to become a binding contract until the performance of some condition precedent resting in parol. *Pym v. Campbell*, 6 El. & Bl. 370; *Wallis v. Littell*, 11 C. B. (N. S.) 368; *Wilson v. Powers*, 131 Mass. 539; *Seymour v. Cowing*, 4 Abb. Ct. App. Dec. 200; *Benton v. Martin*, 52 N. Y. 570; *Juilliard v. Chaffee*, 92 Id., 535, and cases cited; *Taylor on Ev.*, § 1038; *Stephen's Dig. Ev.*, § 927. Upon this ground, we think the evidence of the parol understanding, and also that the reports of the agencies were unsatisfactory, was properly admitted by the referee and sustained his report, and that the General Term erred in reversing his judgment. It is perhaps needless to say that such a defense is subject to suspicion, and that the rule stated should be cautiously applied to avoid mistake or imposition, and confined strictly to cases clearly within its reason.

The order of the General Term should be reversed, and the judgment on the report of the referee affirmed.

All concur.

Order reversed and judgment affirmed.¹⁷

Evidence as to the terms of a contract.

GANSON *et al.* v. MADIGAN.

15 WISCONSIN, 144. — 1862.

Action for price of reaper. Defense, non-delivery. Judgment for defendant. Plaintiffs appeal.

Defendant ordered of plaintiffs in writing a reaper, warranted "to be capable, with one man and a good team, of cutting and raking off and laying in gavels for binding, from twelve to twenty acres of grain in a day." Defendant was allowed to testify against plaintiffs' objection that the agent said "one span of horses" such

¹⁷ Accord: *Westman v. Krumweide*, 30 Minn. 313; *Blewitt v. Boorum*, 142 N. Y. 357 (sealed instrument). See for subsequent parol agreement, *Brown v. Everhard*, 52 Wis. 205; *Homer v. Ins. Co.*, 67 N. Y. 478. That strangers to the contract may vary or contradict it by parol, see *Kellogg v. Thompson*, 142 Mass. 76.

as defendant's would do the work, and another witness (Gunn) was also allowed to testify to the effect that in a sale to him the agent said two horses would do the work. The evidence went to establish that the machine plaintiffs allege they tendered to defendant required four horses to run it.

DIXON, C. J. The word "team," as used in the contract, is of doubtful signification. It may mean horses, mules, or oxen, and two, four, six, or even more of either kind of beasts. We look upon the contract and cannot say what it is. And yet we know very well that the parties had some definite purpose in using the word. The trouble is not that the word is insensible, and has no settled meaning, but that it at the same time admits of several interpretations, according to the subject matter in contemplation at the time. It is an uncertainty arising from the indefinite and equivocal meaning of the word, when an interpretation is attempted without the aid of surrounding circumstances. It appears on the face of the instrument, and is in reality a patent ambiguity. The question is, can extrinsic evidence be received to explain it? We think it can. There is undoubtedly some confusion in the authorities upon this subject, especially if we look to the earlier cases; but the later decisions seem to be more uniform. As observed by Chancellor Desaussure, in *Dupree v. McDonald* (4 Des. 209), the great distinction of *ambiguitas latens*, in which parol evidence has been more freely received, and *ambiguitas patens*, in which it has been more cautiously received, has not been sufficient to guide the minds of the judges with unerring correctness; some of the later cases show that there is a middle ground, furnishing circumstances of extreme difficulty. Judge Story was of opinion (*Peisch v. Dickson*, 1 Mason, 11) that there was an intermediate class of cases, partaking of the nature both of patent and latent ambiguities, and comprising those instances where the words are equivocal, but yet admit of precise and definite application by resorting to the circumstances under which the instrument was made, in which parol testimony was admissible. As an example, he put the case of a party assigning his freight in a particular ship by contract in writing; saying that parol evidence of the circumstances attending the transaction would be admissible to ascertain whether the word "freight" referred to the goods on board of the ship, or an interest in the earnings of the ship. This distinction seems to be fully sustained by the later authorities, and we can discover no objection

to it on principle. *Reay v. Richardson*, 2 C., M. & R. 422; *Hall v. Davis*, 36 N. H. 569; *Emery v. Webster*, 42 Maine, 204; *Baldwin v. Carter*, 17 Ct. 201; *Drake v. Goree*, 22 Ala. 409; *Cowles v. Garrett*, 30 Ala. 348; *Waterman v. Johnson*, 13 Pick. 261; *Mechs.' Bank v. Bank of Columbia*, 5 Wheat. 326; *Jennings v. Sherwood*, 8 Ct. 122; 1 Greenl. Ev. §§ 286, 287, and 288.

The general rule is well stated by the Supreme Court of New Hampshire, in *Hall v. Davis*, as follows:

“As all written instruments are to be interpreted according to their subject matter, and such construction given them as will carry out the intention of the parties, whenever it is legally possible to do so, consistently with the language of the instruments themselves, parol or verbal testimony may be resorted to, to ascertain the nature and qualities of the subject matter of those instruments, to explain the circumstances surrounding the parties, and to explain the instruments themselves by showing the situation of the parties in all their relations to persons and things around them. Thus if the language of the instrument is applicable to several persons, to several parcels of land, to several species of goods, to several monuments, boundaries or lines, to several writings, or the terms be vague and general, or have divers meanings, in all these and the like cases, parol evidence is admissible of any extrinsic circumstances tending to show what person or persons, or what things, were intended by the party, or to ascertain his meaning in any other respect; and this without any infringement of the general rule, which only excludes parol evidence of other language, declaring the meaning of the parties, than that which is contained in the instrument itself.”

If evidence of surrounding facts and circumstances is admitted to explain the sense in which the words were used, certainly proof of the declarations of the parties, made at the time of their understanding of them, ought not to be excluded. And so it was held in several of the cases above cited. 2 C., M. & R. 422; 42 Maine, 204; 13 Pick., 261. Such declarations, if satisfactorily established, would seem to be stronger and more conclusive evidence of the intention of the parties than proof of facts and circumstances, since they come more nearly to direct evidence than any to be obtained, whilst the other is but circumstantial. And though in general the construction of a written instrument is a matter of law for the court—the meaning to be collected from the instrument itself; yet, where the meaning is to be judged of by extrinsic evidence, the construction is usually a question for the jury. *Jennings v. Sherwood*, and other cases above. The circuit judge was therefore right in receiving parol evidence to ascertain the sense in

which the word was used by the parties, and in submitting that question to the decision of the jury.

But he was clearly wrong in receiving evidence of the statements of the plaintiff's agent to the witness Gunn, at the time of making the contract with him. The occasions were different—the two contracts entirely disconnected, and though both concerned a machine of the same pattern and manufacture, yet what was said in the one case was not a part of the transaction in the other. It was no part of the *res gestæ*. If the agent Chase, in negotiating with Gunn, had made an admission of his representations to the plaintiff, evidence of such admission could not have been received. *Mil. and Miss. R. R. Co. v. Finney*, 10 Wis. 388. It would be going much too far, were we to hold that it was proper to give the jury the agent's statement to Gunn, as evidence tending to prove that a similar statement was made to the plaintiff. If it has any such tendency, it is so remote that the law cannot lay hold of and apply it.

The question then comes up, must the judgment, for this reason, be reversed? The defendant's counsel insist not—that the evidence before the jury was sufficient without this, and if it had been rejected, the verdict must have been the same. We are inclined to take the same view. The defendant's testimony was clear and positive as to the kind of team—that the agent said "one span of horses" would work the machine up to the warranty. In this he was not contradicted, but rather corroborated by the agent, who was himself upon the stand. We would naturally expect, if the fact had been otherwise, the agent would have said so. On the other hand, he testifies very frankly that the defendant said he had but one team; that he told him one good team would work the machine. The admission of the improper evidence could not, therefore, have affected the finding of the jury upon this point; and consequently the plaintiffs were not prejudiced by it.

We can hardly believe that the argument of the plaintiff's counsel upon the construction of the warranty, that it referred to the capacity of the machine without regard to the kind of team employed, and was satisfied, if, under any circumstances, and with any number of horses, it could be made to perform as alleged, was urged with any real hope of success. Such a construction would be directly opposed to the manifest intention of the parties.

The jury, upon proper evidence, and under proper instructions having found that the machine delivered at Milwaukee was not

such as the contract called for, the judgment upon their verdict must be affirmed.

Ordered accordingly.¹⁸

Evidence as to the usages of trade.

SOUTIER v. KELLERMAN.

18 MISSOURI, 509.—1853.

GAMBLE, J. The plaintiff alleges that he bought of the defendant (Kellerman) 4,000 shingles, and that he received eight bundles or packs, which only contained 2,500, and having paid for 4,000 brought this suit to recover the value of the number deficient. The defense made by Kellerman was, that by the custom of the lumber trade, two packs of a certain size are regarded as a thousand shingles, and are always bought and sold as such, without any count of the number, and that the eight packs delivered to Soutier were, according to such custom, properly reckoned as four thousand shingles.

1. The defendant asked the court below to declare the law in relation to the effect of the usage of the trade, and for that purpose presented two instructions, which the court refused. As this was a case brought into the court by appeal from a justice of the peace, the code of practice, which is not applicable to proceedings before a justice, is not applicable to the trial before the law commissioner on appeal. Such case is to be tried on the merits *de novo*, and the practice formerly prevailing, in trials by the court without a jury, of asking declarations of the law, is, in such cases, still to be pursued.

2. The defendant asked the court to declare the law as follows: (1) That if the shingles sold to the plaintiff were in ordinary sized packs, and that the price paid was a reasonable price for such kinds of packs, and that such packs are, by common custom, sold two for a thousand, then the plaintiff is not entitled to recover. (2) If the common custom of the lumber trade is to sell two bunches of shingles as a thousand, without regard to actual count, then the plaintiff must be presumed to have had notice of such general custom, and to have purchased accordingly. The court refused to make these declarations of the law, and, on the contrary, declared:

¹⁸ That parol evidence may be introduced to identify a person named in an instrument, see *Andrews v. Dyer*, 81 Me. 104.

"That if the contract was at so much per thousand, and not so much per bundle, and that no express agreement was entered into that two bundles should represent a thousand, then the defendant must deliver the four thousand, or else account to the plaintiff for their value."

The usage of a particular trade is evidence from which the intention and agreement of the parties may be implied; and, although it cannot control an express contract, made in such terms as to be entirely inconsistent with it, yet, in express contracts, the terms employed may have their true meaning and force best understood by reference to such usage. Evidence of such usage is admitted, not to vary the terms of an express contract or to change its obligation, but to determine the meaning and obligation of the contract as made. The usage must appear to be so general and well established, that knowledge of it may be presumed to exist among those dealing in the business to which it applies, so that the contract of the parties may be taken to have been made with reference to it. In this country, many articles which are in terms sold by the bushel (a dry measure, containing eight gallons) are, in fact, sold by weight; the bushel being understood to mean a certain number of pounds, and the number of pounds differing in different articles, as salt, wheat, etc. When such custom becomes general and well established, so as to be known to the community, it is obvious that a contract for a given number of bushels must mean the bushel as ascertained by weight, whether in fact the number of pounds of the article sold would measure more or less than the real bushel. The rule here stated is laid down with great distinctness, in 3 Starkie's Ev. 1033, and applied in *Smith v. Wilson* (3 Barn. & Adolph. 728) to a case where 1,000 rabbits was held to mean 1,200.

In the present case there was evidence that a general custom prevailed in the lumber trade of estimating two packs of shingles, of certain dimensions, as a thousand shingles, without reference to the number of pieces in the pack. If such was the usage of the trade, so general and well established that those buying and selling might be presumed to deal in reference to it, there does not appear to have been any such contract shown in this case as would prevent the usage from applying. The law commissioner seems to have thought that the defendant could not escape from liability "if the contract was at so much per thousand" unless there was "an express agreement that two bundles should represent a thousand." This was an incorrect statement of the law, in a case where evidence was

given of a general usage, that a thousand shingles meant two packs of certain dimensions. Whether there was as full evidence of the usage given as ought to have been given, is not a question upon which we pass, but there was evidence of the usage upon which the party was entitled to have the law differently declared, if the evidence proved the usage as general, well established, and known, so that contracts might be presumed to be made with reference to it. It was not necessary that the defendant should show an express agreement that two bundles should represent a thousand.

The judgment is reversed, with the concurrence of the other judges, and the cause remanded.¹⁹

ENGINEERING CASES: EXCERPTS FROM DECISIONS.

EVIDENCE.

Testimony as to information obtained from scientific text-books is admissible in court. *Hardiman v. Brown*, 39 N. E. Rep. 192 (Mass.).

Maps, profiles, cross-sections, etc., of engineering constructions may be allowed to go to the jury at the discretion of the court, if they have been properly introduced as evidence. *Cunningham v. Massena R. Co.*, 18 N. Y. Supp. 600.

Scientific books cannot generally be used as evidence to prove the statements they contain. *Johnston v. Richmond & D. R. Co.*, 22 S. E. Rep. 694.

The testimony of a witness that he had obtained rules from standard text-books for the excavation of cuts and filling of embankments was considered competent, and the rules were admitted as evidence. *Central R. R. Co. v. Mitchel*, 63 Ga. 173.

Testimony of facts must be from recollection. An engineer may refresh his memory from his notes, but he may not read his memoranda. *Wilde v. Hexter*, 50 Barb. 448.

Where an architect made measurements and took data while the

¹⁹ *Sweeney v. Thomason*, 9 Lea (Tenn.), 359. See also *Walls v. Bailey*, 49 N. Y. 464; *Hubble v. Cole*, 85 Va. 87.

work was in progress and later on made out his certificate, it was held admissible. *Cunningham v. Massena R. Co.*, 18 N. Y. Supp. 600. See 114 N. Y. 498.

Where the original notes have been lost the witness may use a copy if he testify that the original figures were made at the time of the work, that they are correct and that the copy is correct. *Anderson v. Imhoff*, 51 N. W. Rep. 854 (Neb.).

Photographs of maps, deeds, etc., taken from public records which cannot be removed from their depositories may be introduced as evidence. *Blair v. Pelham*, 118 Mass. 421.

SECTION II.

CONSTRUCTION.

The term construction as used here is the determination of the meaning of the words in an instrument or oral agreement and the manner in which they shall be applied. It is synonymous with interpretation.

1. There must first be doubt concerning the meaning of words before there can be any construction by the court or jury.¹

2. Grammatical errors or mistakes in writing which are obvious to all, will be corrected by the court.

3. The main object in the interpretation of a contract is to ascertain and give effect to the intent of the parties,² rather than to the particular arrangement of words which may have been used.³ Generally words are to be taken in their literal meaning.⁴

4. All the separate parts of a contract are to be construed with respect to the whole.⁵ The inference is that each part was intended to have a meaning which would explain the other parts.⁶

5. The expressions in a contract are to be given the meaning

¹ *Dwight v. Ins. Co.*, 103 N. Y. 347; *Williamson v. McClure*, 37 Pa. St. 409; *Canterbury v. Miller*, 76 Ill. 355; *Walker v. Tucker*, 70 Ill. 527, 532.

² *Flagg v. Eames*, 40 Vt. 21; *C. B. & Q. R. R. v. Aurora*, 99 Ill. 205; *Field v. Leiter*, 118 Ill. 17; *Walker v. Douglas*, 70 Ill. 445, 448.

³ *Ford v. Beech*, 11 Q. B. 852, 866; *Canal Co. v. Hill*, 15 Wal. 94, 103.

⁴ *Detroit Stove Wks. v. Perry*, 7 Fed. Cas. 555; *Reed v. Ins. Co.*, 95 U. S. 23.

⁵ *Ward v. Whitney*, 8 N. Y. 446; *Bell v. Bruen*, 1 How. (U. S. S. C.) 169, 184; *Rich v. Lord*, 18 Pick. (Mass.) 322; *Bowman v. Long*, 89 Ill. 19.

⁶ *Alton v. Transportation Co.*, 12 Ill. 56; *Stout v. Whitney*, 12 Ill. 228.

they ordinarily have in the particular line of business to which they apply,⁷ and not the interpretation naturally given by one unfamiliar with the business.⁸

6. The wording of a contract is construed with reference to the circumstances existing at the time the contract was made.⁹

7. Words which are inconsistent with the intent of the parties are cancelled.¹⁰

8. If there are several instruments referring to the same subject-matter, the same parties and the same transaction, they are construed together.¹¹

9. If two parts of a contract are inconsistent, one of which is written and the other printed, the written part will prevail.¹²

10. If the wording of a portion of a contract is inconsistent with the nature of the contract as a whole, such part will be rejected.¹³

11. Where two constructions may be given to a contract, one making it legal and the other making it illegal, the former will be taken.¹⁴

12. Where in a choice of interpretations one tends to uphold the contract and to make it operative, while the other makes it inoperative, the former will be held.¹⁵

13. In general, if no other rule applies, the language of a contract is to be construed against the person making it,¹⁶ except in case of a penalty or forfeiture.

14. Ambiguous words in a deed will be given a construction against the grantor; in a promissory note, against the maker; and

⁷ *Bissell v. Ryan*, 23 Ill. 566, 571; *Packard v. Van Schoick*, 58 Ill. 79; *Dana v. Fiedler*, 12 N. Y. 40.

⁸ *Wynkoop v. Cowing*, 21 Ill. 581.

⁹ *Wood v. Clark*, 121 Ill. 359; *Reed v. Ins. Co.*, 95 U. S. 23, 30; *Lacy v. Green*, 84 Pa. St. 514.

¹⁰ *Buck v. Burk*, 18 N. Y. 337, 339.

¹¹ *Knowles v. Toone*, 96 N. Y. 534, 536; *Holbrook v. Finney*, 4 Mass. 566, 569; *Bailey v. E. R. Co.*, 17 Wal. 108.

¹² *Clark v. Woodruff*, 83 N. Y. 518, 523; *Chadsey v. Guion*, 97 N. Y. 333; *Amer. Express Co. v. Pinckney*, 29 Ill. 392, 410.

¹³ *Buck v. Burk*, 18 N. Y. 337, 339.

¹⁴ *Lorrillard v. Clyde*, 86 N. Y. 384; *Hobbs v. McLean*, 117 U. S. 567; *United States v. R. R. Co.*, 118 U. S. 235.

¹⁵ *Field v. Leiter*, 118 Ill. 17; *Atwood v. Cobb*, 16 Pick. 229; *Saunders v. Clark*, 29 Cal. 299.

¹⁶ *Deblois v. Earle*, 7 R. I. 26; *Duryea v. Mayor*, 62 N. Y. 592.
case of a penalty or forfeiture.

in an insurance policy, against the insurer, for in each case the party is supposed to have chosen the words and used them.¹⁷

15. Where there is a fixed time for the performance of a contract, such as in a sale of real estate, the law holds this matter to be "of the essence of the contract." If one party does not fulfill the condition, the other party may consider the contract broken.¹⁸

16. In the matter of penalties and liquidated damages, if the contract calls for the payment of a certain sum for non-performance, it is a question of construction whether the court will consider this payment a penalty or liquidated damages. In case of a penalty, the amount recovered is not the sum specified, but the actual damage. The sum named is allowed as liquidated damages. The court will not follow the wording of the contract; if a specified sum called "liquidated damages" is found to be in fact a penalty, it will be treated as such.¹⁹

17. If a contract involves the payment of a sum as yet undetermined, but contains a provision that a fixed sum is to be paid for a violation of one of the terms of the agreement, this sum may be recovered as liquidated damages.

18. If a contract involves the payment of a fixed sum and upon breach of its terms a greater sum, the increase in the amount is regarded as a penalty and not as liquidated damages.

CASES.

SECTION II.—CONSTRUCTION.

General rules as to construction.

REED *v.* INSURANCE CO.

95 UNITED STATES, 23.—1877.

Appeal from a decree of the Circuit Court of the United States for the District of Maryland, affirming a decree of the District Court dismissing a libel.

¹⁷ *Waterman v. Andrews*, 14 R. I. 589; *Massic v. Belford*, 68 Ill. 290; *Reynolds v. Ins. Co.*, 47 N. Y. 597.

¹⁸ *Norrington v. Wright*, 115 U. S. 188; *Davison v. Von Lingen*, 113 U. S. 40.

¹⁹ *Streeper v. Williams*, 48 Pa. St. 450.

MR. JUSTICE BRADLEY. This is a cause of contract, civil and maritime, commenced by a libel *in personam* by Samuel G. Reed, the appellant, against the Merchants' Mutual Insurance Company of Baltimore, the appellee, to recover \$5000, the amount insured by the latter on the ship *Minnehaha*, belonging to the libellant. The policy was dated the fourteenth day of January, 1868, and insured said ship in the amount named, lost or not lost, at and from Honolulu, *via* Baker's Island to a port of discharge in the United States not east of Boston, with liberty to use Hampton Roads for orders, "the risk to be suspended while vessel is at Baker's Island loading." The ship was lost at Baker's Island, where she had gone for the purpose of loading, on the third day of December, 1868. The defense was that the loss occurred whilst the risk was suspended under the clause above quoted; also laches by reason in the delay in commencing suit, being more than four years after the cause of action accrued.

This case, upon the merits, depends solely upon the construction to be given to the clause in the policy before referred to, namely, "the risk to be suspended while vessel is at Baker's Island loading;" and turns upon the point whether the clause means, while the vessel is at Baker's Island *for the purpose of loading*, or while it is at said island *actually loading*. If it means the former, the company is not liable; if the latter, it is liable.

A strictly literal construction would favor the latter meaning. But a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties. That such was not the sense in which the parties in this case used the words in question is manifest, we think, from all the circumstances of the case. Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language,

from falling into mistakes and even absurdities. On this subject Professor Greenleaf says:

“The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the courts in such cases is to ascertain, not what the parties may have secretly intended, as conradistinguished from what their words express, but what is the meaning of the words they have used.” 1 Greenl. Ev., sec. 277.

Mr. Taylor uses language of similar purport. He says:

“Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this, the judge must put himself in the writer’s place, and then see how the terms of the instrument affect the property or subject matter. With this view, extrinsic evidence must be admissible of all the circumstances surrounding the author of the instrument.” Taylor, Ev., sec. 1082.

Again he says:

“It may, and indeed it often does, happen, that, in consequence of the surrounding circumstances being proved in evidence, the courts give to the instrument, thus relatively considered, an interpretation very different from what it would have received had it been considered in the abstract. But this is only just and proper; since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it.” Id., sec. 1085.

See *Thorington v. Smith*, 8 Wall. 1, and remarks of Mr. Justice Strong in *Maryland v. Railroad Company*, 22 Id. 105.

The principles announced in these quotations, with the limitations and cautions with which they are accompanied, seem to us indisputable; and availing ourselves of the light of the surrounding circumstances in this case, as they appeared, or must be supposed to have appeared, to the parties at the time of making the contract, we cannot doubt that the meaning of the words which are presented for our consideration is that the risk was to be suspended while the vessel was at Baker’s Island for the purpose of loading, whether actually engaged in the process of loading or not. Taking this clause in absolute literality, the risk would only be suspended when loading was actually going on. It would revive at any time after the loading was commenced, if it had to be discontinued by

stress of weather, or any other cause. It would even revive at night, when the men were not at work. This could not have been the intent of the parties. It could not have been what they meant by the words "while vessel is at Baker's Island loading." It was the place, its exposure, its unfavorable moorage, which the insurance companies had to fear, and the risk of which they desired to avoid. The whole reason of the thing and the object in view point to the intent of protecting themselves whilst the vessel was in that exposed place for the purpose referred to, not merely to protect themselves whilst loading was actually going on. Her visit to the island was only for the purpose of loading; as between the contracting parties, she had no right to be there for any other purpose; and, supposing that they intended that the risk should be suspended whilst she was there for that purpose, it would not be an unnatural form of expression to say, "the risk to be suspended while vessel is at Baker's Island loading." And we think that no violence is done to the language used, to give it the sense which all the circumstances of the case indicate that it must have had in the minds of the parties.

If we are right in this construction of the contract, there can be no uncertainty as to its effect upon the liability of the underwriters. The loss clearly accrued at a time when, by the terms of the policy, the risk was suspended. The ship sailed in ballast from Honolulu on or about the 7th of November, 1867, and arrived at Baker's Island on the afternoon of the twentieth day of November, 1867. She came to her mooring in safety, and her sails were furled, shortly after which a heavy gale and heavy surf arose. The gale and surf continued with violence until the 3d of December, 1867, when the ship parted her moorings, and was totally wrecked and lost. At no time after her arrival at Baker's Island was it possible to discharge ballast to receive cargo or to commence the progress of loading. The violence of the winds, current, and waves, and their adverse course and direction, prevented the ship from slipping her cables and getting to sea, or otherwise escaping the perils that surrounded her.

These facts are indisputable; and they show that, when the loss occurred, the vessel was at Baker's Island for the purpose of loading. That the process of loading had not actually commenced is of no consequence. The suspension of the risk commenced as soon as the vessel arrived at the island and was safely moored in her proper station for loading.

The appellee, as a further defense, set up laches in bringing suit. The libel was not filed until more than four years had elapsed after the cause of action had accrued. The statute of limitations of Maryland requires actions of account, assumpsit, on the case, etc., to be brought within three years; and the counsel for the appellee insists that by analogy to this statute the admiralty court, having concurrent jurisdiction with the state courts in his case, should apply the same rule. We had occasion, in the case of *The Key City* (14 Wall. 653), to explain the principles by which courts of admiralty are governed when laches in bringing suit is urged as an exception in cases cognizable therein. In view of the construction which we have given to the contract in this case, it is not necessary to pass upon the precise question now raised by the appellee.

It is also unnecessary to examine other questions which were mooted on the argument.

Decree affirmed.²⁰

Rules of construction as to time and penalties.

STREEPER *v.* WILLIAMS.

48 PENNSYLVANIA STATE, 450.—1865.

Assumpsit to recover damages for the non-performance of a contract to purchase plaintiff's hotel.

The court allowed the jury to find the actual damage, which they fixed at \$50, reserving the question whether judgment should be entered for that amount or for the amount of \$500 fixed as a "forfeit" in the contract. Subsequently the court entered judgment for \$500, the amount fixed in the contract. Defendant appeals.

AGNEW, J. This case is very defectively stated. We find, in our paper-book, no copy of the bill of exceptions, and no statement of facts. We understand, from the argument, that it was a case of total failure on the part of the defendant, and we infer, from the verdict against the defendant, that the plaintiff must have tendered performance on his part.

²⁰ See also *Davison v. Von Lingen*, 113 U. S. 40; *Norrington v. Wright*, 115 U. S. 188; *Moore v. Ins. Co.*, 62 N. H. 240.

Upon these facts and the terms of the agreement we must determine whether the stipulated sum is a penalty, or liquidated damages. Upon no question have courts doubted and differed more. It is unnecessary to examine the numerous authorities in detail, for they are neither uniform nor consistent. No definite rule to determine the question is furnished by them, each being determined more in direct reference to its own facts than to any general rule. In earlier cases, the courts gave more weight to the language of the clause designating the sum as a penalty or as liquidated damages. The modern authorities attach greater importance to the meaning and intention of the parties. Yet the intention is not all-controlling, for in some cases the subject matter and surroundings of the contract will control the intention where equity absolutely demands it. A sum expressly stipulated as liquidated damages will be relieved from, if it is obviously to secure payment of another sum capable of being compensated by interest. On the other hand, a sum denominated a penalty, or forfeiture, will be considered liquidated damages where it is fixed upon by the parties as the measure of the damages, because the nature of the case, the uncertainty of the proof, or the difficulties of reaching the damages by proof, have induced them to make the damages a subject of previous adjustment. In some cases the magnitude of the sum, and its proportion to the probable consequence of a breach, will cause it to be looked upon as minatory only. Upon the whole, the only general observation we can make is that in each case we must look at the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract and its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case. Equity lies at the foundation of relief in the case of forfeiture and penalties, and hence the difficulty of reaching any general rule to govern all cases. The research of counsel has furnished us with many authorities, but I refer to the following only as containing these general views: *Chase v. Allen*, 13 Gray, 42; *Sainter v. Ferguson*, 7 C. B. 716; *Chamberlain v. Bagley*, 11 N. H. 234; *Gamon v. Howe*, 2 Shep. 250; *Mead v. Wheeler*, 13 N. H. 351; *Main v. King*, 10 Barb. S. C. 59; *Niver v. Rossman*, 18 Barb. 50; *Lampman v. Cochran*, 19 Id. 388; *Cotheal v. Talmage*, 5 Seld. 551; *Duffy v. Shockey*, 11 Ind. 70; *Jaquith v. Hudson*, 5 Mich. 123.

The agreement in this case is a contract for the sale of a hotel. The plaintiff agreed to make a clear title to defendant on the first day of April following its date, which was in February, and to give immediate possession of the bar-room and fixtures. The defendant was to pay \$3000 on the signing of the deed on the 1st of April, and agreed that plaintiff should retain possession of a certain part of the property four weeks. The price was to be \$14,000, but no time was fixed for the payment of any part except the \$3000. Then came the clause in question: "The parties to the above agreement do severally agree to forfeit the sum of \$500—say five hundred dollars, in case either party fail to comply with the terms of this agreement." The first feature striking our attention is the great disproportion between this sum and the purchase money, or even the portion to be paid on the 1st of April, when the deed was to be made. Clearly, it was not intended to enforce payment of the purchase money, or its first instalment only. Nor could it be intended to protect the defendant against a failure to make the title after payment of the first instalment. This leads obviously to the conclusion that the only intention of stipulating this sum was to protect against a total failure where the contract was abandoned. If either party failed, the other might abandon and demand the sum stipulated for this contingency. Were the sum adequate in magnitude to compel specific performance, we might conclude it was intended as a penalty only, against which equity would relieve on a full compliance with the contract. But its manifest inadequacy, as compared with the value or the price of the property, leaves no other reasonable conclusion than that it was intended as a compensation to either party, when the other wholly abandoned the contract. In this view, the parties must have intended the sum as liquidated damages, and not as a penalty.

But this intention might not alone determine the equity and therefore we also look at the state of the case as it probably might be in case of abandonment; for, if the damages are definite in their nature, and easily to be ascertained, it might be unconscionable to award the whole sum as damages. This leads to a consideration of the subject matter, and the terms of the contract. The property is a hotel—the plaintiff describes himself to be a hotel-keeper, and he contracts to deliver immediate possession of a part. Now, this involves the breaking up of his business, the purchase or lease of a new residence, and the disposal of furniture needed for a hotel,

but probably not for a private family. Relying on the performance of the defendant, the plaintiff may make many journeys in search of a new home, encounter difficulties in suiting himself, involve himself in new purchases, raise large sums of money, and in many ways incur heavy losses and expenses, and yet he may be unable, or find it very difficult, to prove their extent. So the defendant might contract for the sale of his own property, purchase furniture and liquors, contract for loans of money to perform his contract, and incur liabilities, all causing him losses very difficult to be ascertained. Now every one knows how difficult it is to reach and estimate the real losses men suffer from disappointment in their plans, and many of the subjects of loss cannot be put in evidence. An accurate account can scarcely be stated in dollars and cents, and yet but few, if asked to name a sum for a total abandonment of such a contract, would be willing to take the risk much lower than the sum stipulated here.

From all the circumstances, added to the intention deduced from the contract, we conclude that the parties fixed the sums stipulated, as the measure of the damages either would probably suffer from a total failure, and the compensation to be made therefor. The word "forfeit", according to many of the authorities, is therefore outweighed by the other elements of interpretation, and we must construe it as meaning "to pay."

But we are told that the jury assessed the damages at \$50—one-tenth of the stipulated sum. This is true, but it does not follow that they had no difficulty in doing so, or that the very difficulty of proving and making the proof was not the cause of so small a verdict. It establishes only that, as a jury must find upon the evidence, the proof was not sufficient to enable them to give more. But it does not detract from the nature of the case, or explain away the intention gathered from the contract.

The judgment is affirmed.²¹

²¹ See also *Cotheal v. Talmage*, 9 N. Y. 551; *Lansing v. Dodd*, 45 N. J. L. 525; *Diamond Match Co. v. Roeber*, 106 N. Y. 473.

ENGINEERING CASES: EXCERPTS FROM DECISIONS.

CONSTRUCTION.

In a case where a contractor claimed that the contract consisted of proposals duly accepted, and the owner that it was an unsigned written construction contract by the terms of which the work had been done, it was held by the court that the written contract should prevail. *Megrath v. Gilmore*, 39 Pac. Rep. 131 (Wash.).

The construction of the terms of a contract adopted by the parties themselves will generally prevail. *Rose v. Eclipse Carb. Co.* 60 Mo. App. 28.

The acts of the parties determined the construction to be placed upon the terms of a contract where it was uncertain whether side-tracks were to be considered in the length of a road under a contract price of so much per mile of road. *Barker v. Troy, etc. R. Co.*, 37 Vt. 766.

Words, if in common use, are to be taken in their natural, plain, obvious and ordinary significations; but if technical words are used, they are to be taken in a technical sense, unless a contrary intention clearly appears in either case from the context. 49 N. Y. 281.

In contracts, words may be understood in a technical or peculiar sense when such meaning has been stamped upon them by the usage of the trade or place in which the contract occurs. When words are manifestly inconsistent with the declared purpose and object of the contract, they may be rejected. 2 Atk. 32.

CHAPTER V.

THE CONTRACT: ITS DISCHARGE.

After the interpretation of the contract logically comes the discussion of the various methods of loosening the contractual obligation and freeing the parties from the tie with which they have bound themselves. According to our reasoning from the facts, there has been found to be a contract; the next step is to discover how it may be disposed of, or, if it has been discharged, say by a breach, how the right of action arising therefrom shall be handled.

A contract may be discharged by:

- I. Mutual agreement;
- II. Complete performance;
- III. Breach;
- IV. Impossibility of performance;
- V. Operation of law.

SECTION I.

BY MUTUAL AGREEMENT.

Since parties are given the power in law to bind themselves by agreement, so they are likewise privileged to unbind themselves by a similar mutual understanding. This process of putting aside the contract may take three forms: that of waiver; that of a new agreement substituted for the old; and that which is called by many writers a condition subsequent.

The form of the discharge of a contract must be the same as that in which it is originally made. A contract made under seal must be discharged by another agreement under seal. A parol contract may be discharged by a second parol agreement. Where the statutes call for a contract to be in writing, a waiver of the same may be made by parol.¹ But if the discharge be implied by the making of a new agreement, which is inconsistent with the old one, there must be a writing in accordance with the statute.²

¹ *Wulschner v. Ward*, 115 Ind. 219.

² *Hill v. Blake*, 97 N. Y. 216.

(a) Waiver.

1. An executory contract may be waived before breach without a deed and without consideration, that is, no consideration is required other than the discharge of one party by the other.³

2. A contract executed by one of the parties and not by the other cannot be discharged without consideration, except by release under seal, or by performance.

3. Where a defendant alleges a discharge by waiver, he must set up a mutual relinquishment of claims or prove a new consideration for the waiver.⁴

4. The contract in a bill of exchange or a note may be discharged by parol providing the bill or note is surrendered.⁵

(b) New agreement.

1. The terms of a contract may be so altered as to substitute a new contract for the old one, thus disposing of the latter by an express or implied waiver.⁶

2. The alteration in the terms of the agreement must be a substantial one. A mere postponement of the delivery of goods, for instance, at the request of the vendee, would not be enough unless time of performance was an important element.

3. The introduction of new parties or the elimination of parties discharges a contract. If there is a contract between A, B and C, and B and C agree that C shall withdraw, A may consider the contract broken.

4. Where there is a change in the membership of a firm, the debts of the old firm may be transferred to the new firm by the consent of the creditors, the old firm and the new firm, and this may be in express language or implied by conduct.⁷

(c) Stipulation for discharge.

The parties may contemplate non-performance and make certain provisions for the same, such as a failure to comply with a condi-

³ *Wheeler v. New Brunswick, etc. R.*, 115 U. S. 29, 34.

⁴ *Collyer v. Moulton*, 9 R. I. 90; *Alden v. Thurber*, 149 Mass. 271; *Kelly v. Bliss*, 54 Wis. 187.

⁵ *Crawford v. Millsbaugh*, 13 Johns. (N. Y.) 87; *Bragg v. Danielson*, 141 Mass. 195; *Slade v. Mutrie*, 156 Mass. 19.

⁶ *McCreery v. Day*, 119 N. Y. 1.

⁷ *Millerd v. Thorn*, 56 N. Y. 402; *Collyer v. Moulton*, 9 R. I. 90.

tion precedent, the exercise of an option or the presence of a condition subsequent; this is one thing; but non-performance not contemplated by the parties is quite another thing, and when it occurs we have a *breach*.

1. In a sale containing a condition precedent such as a warranty, the vendee may refuse to accept the chattel if he discovers that the term is not complied with, but if he has injured it by his own fault he may not return it.⁸

2. A contract may contain a stipulation which will terminate it at the option of one of the parties; for example, that work shall be done in a satisfactory manner.⁹

3. A contract may hinge on a provision called a *condition subsequent*, which means that upon the happening of a certain event the contract shall end.

The agreement of a ship-owner with the charterer illustrates this provision. The former agrees to carry a cargo from one point to another providing certain contingencies do not occur. If such a contingency beyond his control does take place while the contract is executory, and prevents its completion, the parties are discharged.¹⁰

CASES.

CHAPTER V.—DISCHARGE.

SECTION I.—DISCHARGE BY MUTUAL AGREEMENT.

Discharge by waiver.

COLLYER & CO. v. MOULTON *et al.*

9 RHODE ISLAND, 90.—1868.

Assumpsit. Plea, the general issue.

POTTER, J. The plaintiffs made a verbal contract with the defendants, then partners, to build a machine. The work was charged as fast as done, and the materials when furnished. After

⁸ *Ganson v. Madigan*, 15 Wis. 144.

⁹ *Ray v. Thompson*, 12 Cush. (Mass.) 281.

¹⁰ *Graves v. The Calvin S. Edwards*, 50 Fed. Rep. 477; *Brauer v. Campana Navigacion La Flecha*, 66 Fed. Rep. 776; *The Edwin I. Morrison*, 153 U. S. 199.

a small part of the work had been done, the firm was dissolved; and the defendant Moulton, the same day, gave notice of it to the plaintiffs, and told them he could be no longer responsible for the machine. The defendant Moulton claims that the plaintiffs released him and agreed to look to the other partner for payment; but this the plaintiffs deny. The plaintiffs went on and completed the machine, and then sued Bromley alone for his claim, but discontinued the suit, and now sue both the former partners, the writ having been served on Moulton only.

Where two parties contract, one to do a particular piece of work and the other to pay for it, the latter may, at any time, countermand the completion of it, and in such case the former cannot go on and complete the work and claim the whole price, but will be entitled only to pay for his part performance, and to be compensated for his loss on the remainder of the contract. *Clark v. Marsiglia*, 1 Denio, 317; *Durkee v. Mott*, 8 Barb. S. C. 423; *Hosmer v. Wilson*, 7 Michigan, 294.

In the present case, the two defendants, although the partnership was dissolved, still remain joint contractors so far as the plaintiff was concerned; and we think that either of them had a right to countermand the order before completion, and then the joint contractors would have remained liable as before stated. But the defendant Moulton claims that he was verbally released by the plaintiffs and that the plaintiffs agreed to look to the other defendant, Bromley, alone for their pay.

There is some apparent inconsistency in the language used in the reports and text writers, as to the manner in which a simple contract may be annulled. We think the rule is that so long and so far as the contract remains executory and before breach, it may be annulled by agreement of all parties; but that when it has been broken and a right of action has accrued, the debt or damages can only be released for a consideration; and even so far as it remains executory, it may be said that the agreement to annul on one side may be taken as the consideration for the agreement to annul on the other side. *Dane*, 5, 112; *Johnson v. Reed*, 9 Mass. 84; *Cummings v. Arnold*, 3 Met. 486-9; *Richardson v. Hooper*, 13 Pick. 446; *Blood v. Enos*, 12 Vermont, 625.

So far, therefore, as the contract in the present case remained unfinished on the 10th of February, 1865, when the notice was given and the alleged waiver was made, we may consider, either that the contract was annulled or waived by consent, in which case (the

machine, so far as completed, being tendered or delivered) the plaintiff could claim only for work and materials to that date without further damages,—or that the work was countermanded by the defendant Moulton, without the assent of the plaintiffs, in which case the defendant would be liable for the part performed and for the loss on the part unperformed.

We consider the present case to fall under the first head, the notice to, and declarations and conduct of the plaintiffs amounting to a waiver of the fulfilment of the contract as first made, that is, to a release of the defendant Moulton for the part still unperformed.

But the claim for payment for the part performed stands, as we have seen, on a different ground. Was there any agreement to release Moulton from liability for this, *i. e.*, the part performed; and if so, was there any agreement to take the other partner's individual promise in lieu of the promise of the firm, or anything which would amount to a consideration for the release of the firm?

If, by a mutual arrangement between the plaintiff Collyer and the two defendants, Moulton had been released from his liability for the work already done, and a new promise made by Bromley, the other defendant, to pay for it, this would have been a valid release for a valuable consideration—one debt would have been substituted for the other. *Thompson v. Percival*, 5 B. & A. 925.

But we cannot find sufficient evidence of any promise on the part of the other partner, Bromley, to assume the liability; and if there was none, then the release of liability for the work already done was without consideration, as it is not claimed that there was any other consideration. We cannot find, however, any count in the declaration upon which, upon this view of the case, we can allow for anything except labor done before February 10th, the day of the giving of the notice.

Judgment for plaintiffs for amount so found due.¹¹

Discharge by substituted contract.

McCREERY *et al.* v. DAY *et al.*

119 NEW YORK, 1.—1890.

Action to recover certain sums alleged to be due under a contract between plaintiffs, of the first part, and C. H. Andrews, of the

¹¹ See also *Alden v. Thurber*, 149 Mass. 271.

second part, and C. K. Garrison, defendants' testator, of the third part. Judgment for defendants on the pleadings. Affirmed at General Term. Plaintiffs appeal.

The complaint set out a sealed contract, dated March 2, 1882, by which plaintiffs sold to Garrison a fourth interest in a contract for the construction of a railroad from P. to A., through N., and agreed to turn over to Garrison a fourth of all cash, bonds, and stocks which should be received from the railroad company as payment for the work. Garrison agreed to pay plaintiffs for the work already done, and materials furnished and rights acquired up to the date of the contract, the sum of \$150,000, and pay them from time to time thereafter one-fourth of the amounts expended by them in the further construction of the road under the contract. The action is for the amounts so expended up to the annulment of the contract and for interest during the time Garrison delayed payment of the sum of \$150,000.

The answer set up that on April 13, 1882, the plaintiffs and C. H. Andrews sold to the P. & W. Ry. a fourth interest in that portion of the road constructed between N. & A., for \$150,000, the purchaser agreeing to pay for all work done up to that date. On November 6, 1882, defendants' testator wrote to plaintiffs and Andrews saying he would sign the papers relative to the completion of the road by the P. & W. Ry., but only on condition "that I am not to pay any more money than Mr. Humphrey's Company (the P. & W. Ry.) pays, as provided in the agreement you made with him April thirteenth—that is, \$150,000 and one-fourth of the cost of the road to Newcastle Junction after that date." He also stated that he no longer desired any interest in the road from N. to P., and had given up the contract of March 2d. Afterwards, and in compliance with the terms of that letter, the plaintiffs, with the said C. H. Andrews and the defendants' testator, caused an unsealed agreement, signed by all the parties, to be indorsed on the sealed contract of March 2, 1882, as follows:

"It is agreed by the parties hereto that the within contract is annulled and of no further effect, the same having been superseded by the agreement and arrangement made in lieu thereof, as embodied in the letter of C. K. Garrison . . . dated November 6, 1882, and by a certain agreement made between C. H. Andrews, W. C. Andrews, W. McCreery, James Gallery, Solomon Humphrey and C. K. Garrison, all bearing date October 25, 1882."

The agreement last referred to was fully carried out by all the parties. An order was made requiring plaintiffs to reply, which they did, substantially admitting the foregoing averments of the answer.

ANDREWS, J. The parties by their agreement indorsed on the contract of March 2, 1882, in terms annulled that contract and declared that it should be of no further effect. The claim that the annulment of the contract did not discharge Garrison's obligation under the original contract to pay his proportion of expenditures made by the plaintiffs for the construction of the Pittsburgh, Youngstown and Chicago Railroad, between the date of the contract and its annulment, depends on the intention to be deduced from the agreement of annulment, construed in light of the attending circumstances. Where a contract is rescinded while in the course of performance, any claim in respect of performance, or of what has been paid or received thereon, will ordinarily "be referred to the agreement of rescission, and in general no such claim can be made unless expressly or impliedly reserved upon the rescission." *Leake on Contracts*, 788, and cases cited.

The agreement annulling the original contract recites that the contract had been "superseded by agreements and arrangements made in lieu thereof," embodied in Garrison's letter of November 6, 1882, and the several contracts executed by the parties to that contract, and others, bearing date October 25, 1882. In ascertaining the scope of the agreement annulling the original contract, the letter and the contracts of October 25, 1882, are to be deemed incorporated into the agreement. Construing these several writings together, they plainly show that the parties intended that Garrison should be discharged from all liability under his contract of March 2, 1882, for any expenditures theretofore made, or thereafter to be made in constructing the line between Pittsburgh and Newcastle Junction. The letter was written after Garrison had received the contracts dated October 25, 1882, for execution, and declares that he will sign them on the condition and understanding that he is not to pay anything more than Mr. Humphrey's company pays, under the plaintiffs' agreement with him of April 13, 1882, "that is, \$150,000, and one-fourth of the cost of the road to Newcastle Junction, after that date." The agreement with Mr. Humphrey, of April 13, 1882, provided for the construction of the part of the line of the Pittsburgh, Youngstown and Chicago Railroad between

Newcastle Junction and Akron, by a new corporation to be formed, and that Humphrey should pay the plaintiffs \$150,000 for expenditures incurred and rights acquired on that branch of the road, prior to the making of the contract, and also one-fourth of all expenditures thereafter made in its completion. The letter goes on to state that the agreement with Mr. Humphrey was made "after consulting with me, and, as it insured my road (Wheeling and Lake Erie Railroad) a line to Pittsburgh, I was ready to assent to it in place of the agreement of the second of March, and you know I have so considered it since, and that I was owner of one-fourth of the new company, all previous agreements between us being superseded. I do not want any interest in the road from Newcastle Junction to Pittsburgh. I will pay whatever Mr. Humphrey's company has paid on the agreement of the 13th of April."

The clear import of the proposition of Mr. Garrison in his letter is, that he would sign the contracts of October 25, 1882, provided he should be placed in the same position in respect to the enterprise as that occupied by the company represented by Mr. Humphrey, and be relieved from all interest in, or obligation to contribute to the construction of the part of the Pittsburgh, Youngstown and Chicago Railroad between Pittsburgh and Newcastle Junction. Garrison, thereafter, executed the contracts of October 25, 1882, relating to the construction of the road between Newcastle Junction and Akron, whereby he assumed other and different obligations from those he had assumed by his contract with the plaintiffs of March 2, 1882.

The main claim in the action is to recover from Garrison's estate, under the contract of March 2, 1882, for a share of expenditures made by the plaintiffs in the construction of the part of the Pittsburgh, Youngstown and Chicago Railroad between Pittsburgh and Newcastle Junction, after the date of that contract, and before the execution of the annulment agreement. The agreement annulling the prior contract is supported by adequate consideration. The new obligation which Garrison assumed under the contracts of October 25, 1882, was alone a sufficient consideration. *City of Memphis v. Brown*, 20 Wall. 289. There was a consideration also in the mutual agreement of the parties to the prior contract (which was still executory, although in the course of performance) to discharge each other from reciprocal obligations thereunder and to substitute a new and different agreement in place thereof.

The contract of March 2, 1882, is sealed, while the agreement annulling it is unsealed. Upon this fact the plaintiffs make a point, founded on the doctrine of the common law, that a contract under seal cannot be dissolved by a new parol executory agreement, although supported by a good and valuable consideration, "for every contract or agreement ought to be dissolved by matter of as high a nature as the first deed." *Countess of Rutland's Case*, Coke, Pt. V., 25 b. The application of this rule often produced great inconvenience and injustice, and the rule itself has been overlaid with distinctions invented by the judges of the common law courts to escape or mitigate its rigor in particular cases. But in equity the form of the new agreement is not regarded, and under the recent blending of the jurisdiction of law and equity and the right given by the modern rules of procedure in this country and in England to interpose equitable defenses in legal actions, the common law rule has lost much of its former importance. A recent English writer, referring to the effect of the common law Procedure Acts in England, says: "The ancient technical rule of the common law, that a contract under seal cannot be varied or discharged by a parol agreement, is thus practically superseded." Leake on Contracts, 802. Courts of equity often interfered by injunction to restrain proceedings at law to enforce judgments, covenants, or obligations equitably discharged by transactions of which courts of law had no cognizance. 2 Sto. Eq., § 1573. It is a necessary consequence of our changed system of procedure, that whatever formerly would have constituted a good ground in equity for restraining the enforcement of a covenant, or decreeing its discharge, will now constitute a good equitable defense to an action on the covenant itself.

It was one of the subtle distinctions of the common law as to the discharge of covenants by matter *in pais*, that although a specialty before breach could not be discharged by a parol agreement, although founded on a good consideration, nor even by an accord and satisfaction, yet after breach the damages, if unliquidated, could be discharged by an executed parol agreement, because, as was said, in the latter case the cause of action is founded "not merely on the deed, but on the deed and the subsequent wrong." Broom's Legal Maxims, 848, and cases cited. The absurd results to which the common law doctrine sometimes led is illustrated by the case of *Spence v. Healey*, 8 Exch. 668, in which it was held

that a plea to an action on covenant for the payment of a sum certain, that before breach defendant satisfied the covenant by delivery to, and acceptance by the plaintiff, of goods, machinery, etc., in satisfaction, was bad, *Martin, B.*, saying, "I am sorry I am compelled to agree in holding that the plea is bad. It is difficult to see the correctness of the reason upon which the rule is founded." I suppose there can be no doubt that the facts presented by the plea in the case of *Spence v. Healey* would have constituted a good ground for relief in equity. The technical distinction between a satisfaction before or after breach seems to have been disregarded in this State, and a new agreement by parol, followed by actual performance of the substituted agreement, whether made and executed before or after breach, is treated as a good accord and satisfaction of the covenant. *Fleming v. Gilbert*, 3 John. 530; *Lattimore v. Harsen*, 14 id. 330; *Dearborn v. Cross*, 7 Cow., 48; *Allen v. Jaquish*, Cowen, J., 21 Wend. 633. So, also, a new agreement, although without performance, if based on a good consideration, will be a satisfaction, if accepted as such. *Kromer v. Heim*, 75 N. Y. 574, and cases cited.

In the present case it may be justly said that when the agreement annulling the contract of March 2, 1882, was executed, there had been no breach by Garrison of his covenant therein, as he had not been called upon by the plaintiffs to pay his share of the construction account. But it was the plain intention of the parties that the new arrangement, then entered into, should be a substitute for the liability of Garrison, present and prospective, under the contract of March 2, 1882. The transaction constituted a new agreement in satisfaction of the prior covenant, and was accepted as such. Moreover, it admitted by the reply that the contracts of October 25, 1882, were carried out. It is a case, therefore, of an executory parol contract, made in substitution of the prior and sealed contract, afterwards fully executed, which clearly, under the authorities in this State, discharged the prior contract.

In respect to the claim to recover interest during the time the payment of the \$150,000 was delayed, it is sufficient answer that the complaint admits that the principal sum was fully paid prior to September 13, 1882. The claim for interest did not survive, there being no special circumstances to take the case out of the general rule. *Cutter v. Mayor etc.*, 92 N. Y. 166, and cases cited.

We are of opinion that the facts admitted in the pleadings dis-

close that there was no right of action, and that the complaint, for this reason, was properly dismissed.

The judgment should therefore be affirmed.

All concur.

Judgment affirmed.

SECTION II.

BY COMPLETE PERFORMANCE.

The distinction should be drawn here between executed and executory considerations. The former consists of acts done or values given at the time of making the contract, while the latter consists of promises to do acts or to give values at some future time.

Where one party gives an executed consideration and the other party a promise, the fulfillment of the promise discharges the contract. All has been done. Where both parties give promises, one being the consideration for the other, the performance of one party discharges him, but the contract still exists.

1. The literal performance of a contract is not necessarily essential. A slight deviation which is not intentional will not defeat recovery.¹ However, a greater or a wilful deviation will defeat recovery.²

2. If one party agrees to perform according to the satisfaction of the other, he must meet this satisfaction in order to recover. This rule is modified somewhat by those which follow.

3. In contracts where a personal taste is to be satisfied, the promisee is the sole judge.³

4. In sales of goods where the promisor can be put substantially *in statu quo* the promisee is the sole judge.⁴

5. In contracts for work and labor aside from matters of personal taste, where the work and labor would be wholly lost to the promisor, the courts hold that the promisee must be satisfied when he ought to be satisfied.⁵

¹ *Nolan v. Whitney*, 88 N. Y. 648; *Crouch v. Gutmann*, 134 N. Y. 45; *Hayward v. Leonard*, 7 Pick. (Mass.) 180.

² *Van Clief v. Van Vechten*, 130 N. Y. 571; *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19; *Elliott v. Caldwell*, 43 Minn. 357.

³ *Brown v. Foster*, 113 Mass. 136; *Zaleski v. Clark*, 44 Conn. 218; *Adams, etc., Wks. v. Schnader*, 155 Pa. St. 394.

⁴ *Walter A. Wood etc. Co. v. Smith*, 50 Mich. 565; *Exhaust Ventilator Co. v. Chicago etc. Ry.*, 66 Wis. 218.

⁵ *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387; *Hawkins v. Graham*, 149 Mass. 234.

(a) Tender.

Tender is an offer to deliver something: it may be the act or the payment of money called for in the fulfillment of the contract, the performance of which has been prevented in some manner by the promisee.

1. Where the act called for is the payment of money, a tender of the sum by the debtor does not discharge the debt, although in an action by the creditor it would be a good defense. The debtor must be always ready and willing to pay, and when sued should plead the tender and deposit the money in court.

2. In the case of a debt, the debtor is obliged to find the creditor and pay him the debt when it becomes due, but in the case of a negotiable instrument the holder must present the bill or note to the debtor for payment when it is due.

3. In a contract for the sale of goods, if the vendor fulfills all the terms of the contract as to delivery, and the vendee refuses to accept the goods, the vendor is discharged by such tender of performance and may begin an action or defend one for the breach.

4. The tender of the act or payment of money must conform to any special terms of the contract as to time, place and manner of payment.^a

(b) Payment.

The liability of one of the parties may call for the payment of money. It may be the performance required in the original contract, or in a second contract substituted for the first, or in an agreement to give up a right of action arising from a breach.

1. In a contract between A and B, if B is to pay a certain sum of money at a certain time and in a certain way, a payment so made discharges him from his agreement.

2. Again, if B is required to do certain acts, but wishes to pay a sum of money instead; or if he is obliged to pay a sum in one way and desires to pay it in another, he may substitute a second contract for the first and agree with A to accept the substituted performance instead of that of the original contract. The second contract discharges the first, and the payment of the money by B is performance under the new contract and therefore his discharge.

3. Where a breach has been incurred by one of the parties to

^a *Noyes v. Wyckoff*, 114 N. Y. 204; *Knight v. Abbott*, 30 Vt. 577; *Waldron v. Murphy*, 40 Mich. 668.

the contract, giving the other party a right of action, this obligation may be discharged by a money payment made by the offending party to the party holding the right of action.

4. Where a money payment is performance, or where it has been agreed upon as satisfaction for the breach of performance, a negotiable instrument may be given.

5. The acceptance of a negotiable instrument amounts to the substitution of a new agreement for the old one. The maker of the instrument may be discharged entirely or conditionally from his former obligation, depending upon the terms agreed to.

6. If the maker is discharged absolutely from his first contract, then upon failure to pay the instrument when due, the holder's right of action is upon the instrument, not upon the previous contract.

7. If the maker is discharged conditionally from his first contract by giving the instrument, then upon its dishonor at maturity, the consideration for the payee's promise to refrain from proceeding upon his right of action fails and his right upon the original contract is restored to him.

CASES.

SECTION II.—DISCHARGE BY PERFORMANCE.

Substantial performance.

DUPLEX SAFETY BOILER CO. *v.* GARDEN *et al.*

101 NEW YORK, 387.—1886.

Appeal from a judgment of the Supreme Court at General Term in the second department, affirming a judgment for plaintiff, and from an order denying defendant's motion for a new trial.

DANFORTH, J. The plaintiff sued to recover \$700, the agreed price, as it alleged, for materials furnished and work done for the defendants at their request. The defense set up was that the work was done under a written contract for the alteration of certain boilers, and to be paid for only when the defendants "were satisfied that the boilers as changed were a success." Upon the trial

it appeared that the agreement between the parties was contained in letters, by the first of which the defendants said to plaintiff:

"You may alter our boilers, changing all the old sections for your new pattern; changing our fire front, raising both boilers enough to give ample fire space; you doing all disconnecting and connecting, also all necessary mason work and turning boilers over to us ready to steam up. Work to be done by tenth of May next. For above changes we are to pay you \$700, as soon as we are satisfied that the boilers as changed are a success, and will not leak under a pressure of one hundred pounds of steam."

The plaintiff answered, "accepting the proposition," and as the evidence tended to show, and as the jury found, completed the required work in all particulars by the 10th of May, 1881, at which time the defendants began and thereafter continued the use of the boilers.

The contention on the part of the appellants is that the plaintiff was entitled to no compensation, unless the defendants "were satisfied that the boilers as repaired were a success, and that this question was for the defendants alone to determine," thus making their obligation depend upon the mental condition of the defendants, which they alone could disclose. Performance must of course accord with the terms of the contract, but if the defendants are at liberty to determine for themselves when they are satisfied, there would be no obligation, and consequently no agreement which could be enforced. It cannot be presumed that the plaintiff entered upon its work with this understanding, nor that the defendants supposed they were to be the sole judge in their own cause. On the contrary, not only does the law presume that for services rendered, remuneration shall be paid, but here the parties have so agreed. The amount and manner of compensation are fixed; time of payment is alone uncertain. The boilers were changed. Were they, as changed, satisfactory to the defendants? In *Folliard v. Wallace* (2 Johns. 395) W. covenanted that in case the title to a lot of land conveyed to him by F. should prove good and sufficient in law against all other claims, he would pay to F. \$150, three months after he should be "well satisfied" that the title was undisputed. Upon suit brought the defendant set up that he was "not satisfied," and the plea was held bad, the court saying, "a simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext and cannot be regarded." This decision was followed in *City of Brooklyn v. Brooklyn City R. R. Co.* (47 N. Y. 475) and *Miesell v. Globe Mut. L. Ins. Co.* (76 Id. 115).

In the case before us the work required was specified, and was completed; the defendants made it available and continued to use the boilers without objection or complaint. If there was full performance on the plaintiff's part, nothing more could be required, and the time for payment had arrived; for according to the doctrine of the above cases, "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with."

Another rule has prevailed, where the object of a contract was to gratify taste, serve personal convenience, or satisfy individual preference. In either of these cases the person for whom the article is made, or the work done, may properly determine for himself—if the other party so agree—whether it shall be accepted. Such instances are cited by the appellants. One who makes a suit of clothes (*Brown v. Foster*, 113 Mass. 136), or undertakes to fill a particular place as agent (*Tyler v. Ames*, 6 Lans. 280), mold a bust (*Zaleski v. Clark*, 44 Conn. 218), or paint a portrait (*Gibson v. Cranage*, 39 Mich. 49; *Hoffman v. Gallaher*, 6 Daly, 42), may not unreasonably be expected to be bound by the opinion of his employer, honestly entertained. A different case is before us, and in regard to it no error has been shown.

The judgment appealed from should be affirmed. All concur.

Judgment affirmed.*

7 "The only question in this case is whether the written agreement between the parties left the right of the plaintiff to recover the price of the work and materials furnished by him dependent upon the actual satisfaction of the defendant. Such agreements usually are construed not as making the defendant's declaration of dissatisfaction conclusive, in which case it would be difficult to say that they amounted to contracts (*Hunt v. Livermore*, 5 Pick. 395, 397), but as requiring an honest expression. In view of modern modes of business, it is not surprising that in some cases eager sellers or selling agents should be found taking that degree of risk with unwilling purchasers, especially where taste is involved. *Brown v. Foster*, 113 Mass. 136; *Gibson v. Cranage*, 39 Mich. 49; *Wood Reaping & Mowing Machine Co. v. Smith*, 50 Mich. 565; *Zaleski v. Clark*, 44 Conn. 218; *McClure Bros. v. Briggs*, 58 Vt. 82; *Exhaust Ventilator Co. v. Chicago, Milwaukee & St. Paul Railway*, 66 Wis. 218; *Seeley v. Welles*, 120 Penn. St. 69; *Singerly v. Thayer*, 108 Penn. St. 291; *Andrews v. Belfield*, 2 C. B. (N. S.) 779.

"Still when the consideration furnished is of such a nature that its value will be lost to the plaintiff, either wholly or in great part, unless paid for, a just hesitation must be felt, and clear language required, before deciding that payment is left to the will, or even to the idiosyncrasies, of

ADAMS RADIATOR & BOILER WORKS v. SCHNADER.

155 PENNSYLVANIA STATE, 394.—1893.

Assumpsit for heater sold and delivered. Defense, non-performance. Verdict and judgment for plaintiff. Defendant appeals.

MR. JUSTICE DEAN. Davis C. Schnader, defendant's testator, the owner of a dwelling-house then being built, on the 24th of August, 1889, made a written contract with plaintiffs that they should furnish this house with a steam heater. Among other stipulations is this one:

"We (plaintiffs) guarantee this apparatus for heating by steam to be constructed in a good, thorough, and workmanlike manner, to give entire satisfaction in its operation, and to work entirely noiseless. Should it prove unsatisfactory after a thorough and reasonable trial, we will remove it at our expense, refund the moneys paid to us on account of it, and will place the building in as good a condition as it was when we received it for the purpose of erecting our steam-heating apparatus. We will furnish said steam-heating apparatus complete in all its details for the sum of four hundred and eighty-two dollars (\$482.00); one-half to be paid on completion of the work, and the remainder in sixty days thereafter."

The specifications of kind and size of materials to be used in the constructions are elaborate. We do not deem them, so far as this issue is concerned, very material, for the case turns on the construction to be given that stipulation in the agreement just quoted.

Mr. Schnader moved into his house on Tuesday of the last week in March, 1890, and died on the following Saturday. By his last will, duly proven, he devised the dwelling-house to his son, Milton H. Schnader, his executor and this defendant, subject to a life estate in his widow. Before his death, and before the heater, by use for a reasonable time, had been tested, he paid to plaintiffs about one-half the price.

Milton H. Schnader, son, executor, and devisee, was in the house

the interested party. In doubtful cases courts have been inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy the defendant. *Sloan v. Hayden*, 110 Mass. 141, 143; *Braunstein v. Accidental Death Ins. Co.*, 1 B. & S. 782, 799; *Dallman v. King*, 4 Bing. N. C. 105."—Holmes, J., in *Hawkins v. Graham*, 149 Mass. 284, 287, 288.

with his father for the four days of his last illness, and continued to live there with his mother. He testified that the heater was wholly unsatisfactory to him from the day it was first started; failed to heat the rooms. He notified plaintiffs of this when they demanded payment of the last instalment of the price, and asked them to defer collection until the following December, when the weather would be colder and a better test could be made. This they declined to do, and proposed that James N. Scheible, a plumber, should make an examination of the heater; this was concurred in by Schnader, and the last of June or the first of July Scheible fired it up, and it worked satisfactorily to him, Scheible, on that day, at that season of the year. But Schnader was not satisfied, and on the 6th of September, in response to plaintiffs' written demand of August 25th, for immediate payment, requested them to remove the heater from his premises. The plaintiffs then brought suit for \$274.03, the unpaid balance of their contract price.

At the trial, plaintiffs averred complete performance of their contract according to its terms; defendant denied this. There was considerable evidence adduced on both sides as to the quality and capability of the heater, which was submitted to the jury by the learned court below, on the theory or construction of the agreement, that if the plaintiffs performed their contract according to the specifications, to their own satisfaction and that of the jury, then they should have a verdict. This instruction the appellant's seven assignments of error complain of.

What is a reasonable interpretation of the contract of plaintiffs when they say, "We guarantee this apparatus to give entire satisfaction in its operation, should it prove unsatisfactory after a thorough and reasonable trial, we will remove it at our expense." It must be kept in mind, that this was not a piece of machinery designed to accomplish some single or particular purpose in which power and durability alone constitute desirability or satisfactoriness. A saw-mill may be warranted as of a capacity to cut a certain quantity of lumber per day; a locomotive may be warranted to draw a certain number of tons up a certain grade, or around a certain curve; and if there be a guaranty that they shall give satisfaction, it can reasonably be presumed that the specified power was all that was within the mind of the parties when they contracted. But when the subject of the contract is household furniture, as in *McCarren v. McNulty* (7 Gray, 139); or for a suit of clothes, as in

Brown v. Foster (113 Mass. 136) ; or for a work of art, as in *Hoffman v. Gallaher* (6 Daly, 42) and *Zaleski v. Clark* (44 Conn. 218), the question is not whether the thing contracted for had a certain strength or a particular dimension as specified in the contract, but there come in to make up satisfaction or dissatisfaction those qualities which please, or those defects which are nothing more than annoying. A dwelling-house heater is in use every hour of the day and night; is absolutely indispensable to the health and comfort of the householder and his family; if all the iron and brickwork be made as specified; the valves, gauge-cocks, radiators, boilers, and all other parts, measure as set out in the contract; and if, even on one day in the middle of summer on being fired up and operated by an expert plumber, a degree of heat is attained which, in his opinion, comes up to the point fixed in the contract, these facts would not of themselves determine that it was satisfactory to the man who was to use it in zero weather. If in its ordinary everyday use in heating his house, instead of satisfying him, it was, as he testifies, a constant vexation, we think he was not bound to keep and pay for it.

The reasonable interpretation of the contract is, that Schnader was to be satisfied with the heater; not the plaintiffs; not the plumber, nor other witnesses; not the jury. As is said in *Zaleski v. Clark*: "It is not enough to say she (the defendant) ought to be satisfied with it, and that her dissatisfaction is unreasonable. She, not the court, is entitled to judge of that. The contract was not to make one she ought to be satisfied with, but one she would be satisfied with."

The rule laid down by this court in *Singerly v. Thayer* (108 Pa. 291) is to the same effect, and is clearly applicable to this contract and this evidence. The court says: "He (the defendant) therefore was the person to decide, and to declare whether it was satisfactory. He did not agree to accept what might be satisfactory to others, but what was satisfactory to himself. This was the fact which the contract gave him the right to decide. He was the person who was to test and use it. No other persons could intelligently determine whether in every respect he was satisfied therewith."

The appellees' counsel argue that there is a distinction between this contract and the one in *Singerly v. Thayer*. In the contract before us, plaintiffs agree to remove the heater "should it prove unsatisfactory after a thorough and reasonable trial," while there are no such words in the *Singerly* and *Thayer* contract. But the

plaintiffs on the trial alleged, and offered evidence to prove, that at their suggestion and by consent of defendant a test trial was given this heater in June or July. Mr. Adams, for the plaintiff, testified that the trial demonstrated he had complied with his contract; that is his opinion. He admits that a trial at that time of the year would be a theoretical, not a practical one.

The defendant concedes that on the trial it worked better than it usually did, but he was not convinced it would work satisfactorily to him in cold weather. The fair presumption is, that the "thorough and reasonable trial" contemplated by the parties, was its use by the householder under the supervision and attendance of the ordinary household servants. It was not expected the purchaser would daily employ skilled plumbers or engineers to operate it. In this ordinary and expected use of it from March until June it was unsatisfactory to Schnader; after the trial test made by the expert Scheible, in presence of Adams and Schnader in summer, it still was not satisfactory; was so unsatisfactory that Schnader offered to forfeit all he had paid if plaintiffs would take the heater out.

Of course defendant's dissatisfaction must be genuine, as distinguished from mere caprice or dishonesty; he could not have ordered the heater taken out without a trial by the ordinary methods and service of the householder; nor, for the purpose of evading payment of the balance of the price, could a dishonest declaration of dissatisfaction have been an effectual defense. But there is no evidence of want of good faith in his conduct; he has a right to defend on the ground that the heater does not work satisfactorily to him, after what he considered a thorough and reasonable trial by the ordinary use of it for more than two months, and especially after the test trial proposed by plaintiffs.

In substance, the court below submitted it as a question of fact to the jury to find from the evidence whether he ought to have been satisfied; this was an erroneous interpretation of the contract. The proper interpretation is: (1) Was there a thorough and reasonable trial of the heater by the ordinary daily use of it? (2) Was the defendant then dissatisfied with it? If he was dissatisfied after such trial, the plaintiff cannot recover. Neither the plaintiff, jury, nor witnesses ought to be permitted to make a contract for him; his contract was, that he was to be satisfied, and the plaintiffs must perform their contract in this particular the same as in the item of putting in boilers.

Plaintiffs' counsel further argue that the judgment should be affirmed, because this contract was personal alone to D. C. Schnader, defendant's father, who died four days after the heater was put in the house; as he does not survive to indicate dissatisfaction, the defendant has no authority to do so. The plaintiffs raised no such question in the court below, so far as can be learned from the charge or the points presented; but as the case goes back for retrial, it is best we should here briefly pass upon it.

It would rather lack equality to hold that the contract liability for the price passed to the executor and devisee, but the right to insist on performance died with the testator; neither reason nor law imposes upon us such a decision. If D. C. Schnader had lived to make such trial of the heater as was intended by the contract, and had expressed no dissatisfaction with it, there would be a conclusive presumption of plaintiffs' complete performance; but as he died almost immediately after it was put in, his executor and devisee has the right to set up the same defense as the testator might have done had he lived. It was not a contract for a suit of clothes, or for a set of artificial teeth, which could be satisfactory to but one person, but for a heater, which was to be satisfactory to the occupant of the house where it was to be put; death and the last will have made this defendant the occupant, and he has the right to insist that the heater shall work satisfactorily to him as he has succeeded not only to the property, but to the personal use of it.

The defendant's first assignment of error to the refusal of the court to instruct as requested in first point: "That under the law the contract of August 24, 1889, is a guaranty or warranty that the apparatus would work to the satisfaction of Davis C. Schnader, deceased, and that, if the evidence is believed that as executor he fairly and reasonably tried and tested the apparatus and was dissatisfied with it, and so notified plaintiffs, there can be no recovery," is sustained. This in effect disposes of all the other assignments.

The judgment is reversed and a *venire facias de novo* awarded.⁸

⁸ "The cases where the parties provide that the promisor is to be satisfied, or to that effect, are of two classes; and whether the particular case at any time falls within the one or the other must depend on the special circumstances, and the question must be one of construction.

"In the one class the right of decision is completely reserved to the promisor, and without being liable to disclose reasons or account for his course, and a right to inquire into the grounds of his action and overhaul his deter-

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PERFORMANCE.

It has been held, where an architect was regularly employed to make plans for a building, that evidence could be introduced to show that there was a custom that the employment carried with it an agreement to superintend the construction. *Wilson v. Bauman*, 80 Ill. 493.

The non-performance of a building contract is not excused by inevitable accident. 25 N. Y. 272.

mination, is absolutely excluded from the promisee and from all tribunals. It is sufficient for the result that he willed it. The law regards the parties as competent to contract in that manner, and if the facts are sufficient to show that they did so, their stipulation is the law of the case. The promisee is excluded from setting up any claim for remuneration, and is likewise debarred from questioning the grounds of decision on the part of the promisor, or the fitness or propriety of the decision itself. The cases of this class are generally such as involve the feelings, taste, or sensibility of the promisor, and not those gross considerations of operative fitness or mechanical utility which are capable of being seen and appreciated by others. But this is not always so. It sometimes happens that the right is fully reserved where it is the chief ground, if not the only one, that the party is determined to preserve an unqualified option, and is not willing to leave his freedom of choice exposed to any contention or subject to any contingency. He is resolved to permit no right in any one else to judge for him or to pass on the wisdom or unwisdom, the justice or injustice of his action. Such is his will. He will not enter into any bargain except upon the condition of reserving the power to do what others might regard as unreasonable. The following cases sufficiently illustrate the instances of the first class: *Gibson v. Cranage*, 39 Mich. 49; *Taylor v. Brewer*, 1. M. & S. 290; *McCarren v. McNulty*, 7 Gray, 139; *Brown v. Foster*, 113 Mass. 136; *Zaleski v. Clark*, 44 Conn. 218; *Rossiter v. Cooper*, 23 Vt. 522; *Hart v. Hart*, 22 Barb. 606; *Tyler v. Ames*, 6 Lans. 280.

"In the other class the promisor is supposed to undertake that he will act reasonably and fairly, and found his determination on grounds which are just and sensible, and from thence springs a necessary implication that his decision in point of correctness and the adequacy of the grounds of it are open considerations and subject to the judgment of judicial triers. Among the cases applicable to this class are *Daggett v. Johnson*, 49 Vt. 345, and *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528."—Graves, C. J., in *Walter A. Wood &c. Co. v. Smith*, 50 Mich. 565, 569-571. See also *Exhaust Ventilator Co. v. Chicago &c. Ry.*, 66 Wis. 218; *Silsby Mfg. Co. v. Chico*, 11 Sawyer, 183; 24 Fed. Rep. 893.

It was held that an architect had substantially complied with his contract to draw plans for a building to cost \$10,000, when he furnished plans, etc., for a building to cost \$16,000 and a proposal to reduce the cost to the figure desired. *Marquis v. Lauretson*, 40 N. Y. Rep. 73 (Iowa).

In a contract of employment for an indefinite period, either party may end it at any time. *Greenberg v. Early*, 23 N. Y. Supp. 1009.

SECTION III.

BY BREACH.

When a contract is formed, an obligation is placed upon each of the contracting parties. If one of the parties breaks his obligation, the other party immediately acquires a right of action. It should first be determined whether there is a contract; if there is none, there can be no question as to its breach or its performance. The existence of the contract merely settles the fact that the parties are bound and cannot withdraw without committing a breach. Sometimes this breach will discharge the injured party, from performance of his part of the agreement, but not always. The importance of the breach usually determines this fact. Again, the injured party may decide to waive the breach and continue the contract, reserving the right to sue for damages. Discharge by breach means two things: a release from further performance and a right to bring an action.

(a) *Status of the Parties.*

1. After a breach the injured party may deem himself released from further performance; he may not elect to sue, but if an action is brought against him for non-performance, he may successfully defend it.¹

2. He may bring suit for damages resulting from the breach without showing that his own performance has been done or tendered.

3. He may not waive the breach and keep the contract in existence for the purpose of increasing the damages.²

¹ *Davidson v. Von Lingen*, 113 U. S. 40; *Lake Shore etc. Ry. v. Richards*, 152 Ill. 59.

² *Clark v. Marsiglia*, 1 Denio (N. Y.) 317; *Dillon v. Anderson*, 43 N. Y. 231.

4. If there has been part or complete performance on the part of the injured party, he has a claim to payment for the same, and he may consider this as arising from a new contract due to the acceptance of the executed consideration.³

(b) *Manner in which a breach occurs.*

The parties to an executory contract not only have a right to its performance, but they have a right to the continuance of the contractual relation up to the time of its fulfillment.

1. If one of the parties repudiates the contract before the time of its performance, the other party is discharged if he so elects and may bring suit at once.⁴

2. The renunciation must be unequivocal and absolute; it must be so understood and acted upon by the injured party; it must terminate the entire contract.⁵

3. If one of the parties places himself in such a position that it is impossible for him to perform his part, the effect is the same as though he had renounced the agreement.⁶

4. If one of the parties repudiates the contract during the performance of the same, the other party is exonerated from further performance and may bring his action at once.⁷

(c) *Conditions in contract.**

"A man may make such lawful promise as he sees fit, and is only bound by the promise he has made. This necessarily follows because a contract is, in its nature, based upon the consent of the parties, and hence one can only be bound in contract by the promise to which he has assented. He may make a promise which is to be performed absolutely and at all events, or he may limit such promise in any way he desires. Perhaps he may not be willing to perform until the promisee has done some specified thing, and in

³ *Dermott v. Jones*, 2 Wall (U. S.) 1; *Hale v. Trout*, 35 Cal. 229; *Derby v. Johnson*, 21 Vt. 17.

⁴ *Windmuller v. Pope*, 107 N. Y. 674; *Kurtz v. Frank*, 76 Ind. 574; *Kadish v. Young*, 80 Ill. 170; *Hochster v. Delatour*, 2 E. & B. 678; Contra: *Daniels v. Newton*, 114 Mass. 530.

⁵ *Dingley v. Oler*, 117 U. S. 490; *Roebeling's Sons Co. v. Lock Switch Fence Co.*, 130 Ill. 660; *Davis v. Bronson*, 2 N. Dak. 300.

⁶ *United States v. Peck*, 102 U. S. 64; *Wolf v. Marsh*, 54 Cal. 228.

⁷ *United States v. Behan*, 110 U. S. 338; *Lake Shore etc. Ry. v. Richards*, 152 Ill. 59; *Derby v. Johnson*, 21 Vt. 17; *Hale v. Trout*, 35 Cal. 229.

* Ashley, "Summary of Contracts," Appendix B.

that case he can make the performance of his own promise depend upon that specified thing being done first. In that event the obligation to perform his promise does not arise until the specified precedent act is performed by the promisee. These limitations are known as conditions.

Note.—A condition in contract is a qualification, restriction or limitation inserted by the promisor, modifying or destroying the original act with which it is connected. It may assume the form of a statement or of a promise.

“These true conditions are based upon the intent of the parties as found in the contract. It is not necessary that they be stated in the language of conditions, as the intent must be gathered from the entire contract. They may well be called express conditions, and have been described by Professor Langdell as follows:

“ ‘An express condition, as its name imports, is one of which the evidence must be found in the language of the parties when read in the light of surrounding circumstances.’

“Some contracts are modified by facts or events not mentioned therein. These modifying facts are true conditions and are based on the intent of the parties, although not found in the language of the contract. These have been called conditions implied in fact.

“Shaw, J., in *Cadwell v. Blake*, 6 Gray 402, describes them as follows:

“ ‘When, in the order of events, the act to be done by the one party must necessarily be done before the other can be done, it is necessarily a condition precedent, although there be a stipulation for liquidated damages for the breach on each side, and although there be a fixed future time for payment sufficiently distant to have the work done in the meantime. Suppose B agrees to build, at his own shop, a carriage for A, of A’s materials; A stipulates seasonably to furnish materials, and to pay B in four months; and each, upon failure, stipulates to pay a sum as liquidated damages. The furnishing or tendering the materials by A is a condition precedent. Without it B cannot perform. He must build it of A’s materials. Even building it of his own would not be performance. B has his shop, his workmen and his tools all ready, but A does not furnish the materials. If B sues A, averring readiness to perform, he may recover. But if A sues B for not building the carriage, it would be a good answer that A himself had not furnished the materials, because, whatever else the contract may contain, this is in its nature a condition precedent.

“There is another class of cases where the performance of the promisor depends upon the continuation of life, health or the

existence of some object. In these cases the law will not attach the usual consequences for non-performance. They do not seem to be cases of conditions, but defenses allowed by the courts on account of the extreme hardship of the case. (See Sec. 12 *Harvard Law Review*, 501, 13 *idem*, 605.) Supposing them to be conditions, however, they are precedent and not subsequent. In the supposed case of illness or death the disability occurs either before the time of performance has arrived, and hence before the obligation to perform has arisen, or it occurs after the performance has begun, and then it is simply precedent to the obligation to continue. If a man promises to work from Monday to Sunday and is taken sick on Tuesday, surely his obligation to perform Wednesday has not arisen on such Tuesday, and the disability prevents such obligation from arising.

"A true condition, therefore, affects the obligation to perform a promise by making such obligation depend upon some uncertain event. This may be the happening or non-happening of something specified; it may be the doing or non-doing of some stated act, and, in brief, may be any event which is lawful and which the promisor desires to embody in his promise. No form of language is requisite, and the same event may be both a condition attached to one promise and the subject matter of another promise. Thus A may promise that upon the condition that B does a certain act, and at the same time the consideration of A's promise may be the promise of B to do that very act. If B does not do the act he is liable in damages for non-performance of his promise, and if he endeavors to recover from A for non-performance on his part, A may defend on the ground that the condition has not been performed.

"The happening of the event constituting a condition must not lie in the power or will of the promisor, because a promise and its performance must be obligatory upon him.

"When we are considering true conditions, we are merely ascertaining what the parties have promised; what they intended by the language they used. When we ascertain that intention, which is a question of fact, we then determine what consequences the law annexes to such ascertained fact.

"It is a matter of convenience to classify certain modifications of a promise as conditions, but in its essence we merely mean what did a certain party promise. It of course follows that we cannot have a condition unless we first find a promise which it is to modify.

"In every instance the questions as to consideration arise in reference to the promise which is under consideration, and while that promise is being construed we do not regard any conditions attached to other promises in the contract. If an action is brought for the breach of a bilateral contract we are concerned solely with the conditions connected with the defendant's promise. For the purpose of that action we do not look into conditions attached to the plaintiff's promise. Thus the condition precedent attached to the defendant's promise may be something to be done by the plaintiff and at the same time the plaintiff may have promised to do the same thing. Perhaps the plaintiff may have been relieved from performing that promise by the breach of some condition precedent so that he is not liable in damages, if he does not perform. But all this plays no part in considering the defendant's liability. The sole question is whether the plaintiff has performed the condition precedent to the defendant's promise, and if not he cannot recover. In other words, while the plaintiff is not liable if he does not perform, he nevertheless cannot hold the defendant liable without such performance.

"Conditions are classified as precedent, concurrent and subsequent.

"We have a condition precedent in a promise when the obligation to perform does not arise until the uncertain event named as such condition occurs, and becomes known or may become known to the parties.

"Consequently, it is part of the plaintiff's case to allege and establish the happening of the event named as a condition precedent, because until the event happens there is no breach of promise on the part of the defendant, as he was under no obligation to perform before that.

"Concurrent conditions occur in cases where the performance of the promise and the act which constitutes the condition to such promise are possible at the same moment. They may be found in bilateral contracts, or in unilateral contracts in the case of covenants at Common Law. They may be express or implied in law.

"They are mainly conditions implied in law and governed by the rules applicable to such conditions. Where they exist, it is necessary that the one party, to put the other party in default, shall be ready and willing to perform on his part, and in some cases tender performance, and on bringing his action he must aver and prove these facts. Such conditions are in reality conditions precedent.

Readiness and willingness rather than actual performance is the requisite, because that is the fact fixed upon as the condition.

"A condition subsequent is one which terminates an obligation to perform after the same has arisen.

"The happening of the event named must in such cases be alleged and proved by the defendant. The obligation to perform has arisen, and the defendant, therefore, commits a breach of contract by not performing unless he can show that his obligation has ceased. It is doubtful whether any case of condition subsequent can be found in contract. Conditions subsequent upon happening terminate a right which has already arisen. Thus where A conveys real property to B in fee simple and the deed contains a proviso that if windows are ever opened in the west wall of the building standing thereon, the grant shall thereupon cease and determine and revert back to the grantor or his legal representatives. This proviso is a condition subsequent. Such conditions are not unusual in transfers of property. In contracts, however, examples are often given which are really conditions precedent."

As previously stated, conditions in contract may be divided into express conditions and implied conditions, i. e., a covenant or promise may be conditional, either expressly or by implication or construction. The rules developed by the court relating to conditions and applied or not at the discretion of the court are here given:

IMPLIED CONDITIONS.⁸

"In every purely bilateral contract (i. e., in every contract which is wholly executory on both sides), as all covenants or promises on the one side are collectively the equivalent of all the covenants or promises on the other side, the covenants or promises on each side are *prima facie* subject to the implied condition that the covenants or promises on the other side be performed at the same time. In other words, the two sides of every purely bilateral contract, being the equivalent of each other, constitute *prima facie* mutual concurrent conditions. But as this rule is very general, and like all other rules of construction, only holds *prima facie*, in applying it the following distinctions must be borne in mind:

"1. If the covenant or promise on the one side is to do specific acts which require time for their performance, while the covenant

⁸ Arranged by Professor Langdell of Harvard Law School and reprinted later by Professor C. D. Ashley, Dean New York University Law School.

or promise on the other side is simply to pay money, the specific acts must *prima facie* be fully performed before the money is payable. In other words, the two sides of the contract do not in that case constitute mutual and concurrent conditions, but one side is subject to a condition precedent, while the other side is absolute and unconditional.

“The most common instances of contracts of this description are ordinary contracts for service, building contracts and charter-parties, while the most common instances of contracts to which the general rule applies, i. e., where the two sides of the contract constitute mutual and concurrent conditions, are contracts for the sale of real and personal property.

“2. When, by the express terms of the contract, one side is to be performed before the other, the side which is to be performed first is independent and absolute, while the other side is subject to condition precedent.

“3. If the covenant or promise on the one side is to do specific acts which require time for their performance, while the covenant or promise on the other side is simply to pay money, and the time for the payment of the money is fixed, while the time for performance on the other side is left indefinite, and may be either before or after the money becomes payable, or partly before and partly afterwards, according to circumstances—both sides of the contract will be deemed independent and absolute.⁹

“4. But when, in an agreement for the sale of real estate, a day is fixed for the payment of the money, and nothing is said as to the time of delivering the deed, the deed will be deliverable by implication when the money is payable; and the effect will be the same as if the same day had been expressly fixed for the payment of the money and the delivery of the deed, and the two sides of the contract will be mutual and concurrent conditions.¹⁰

“5. When the covenant or promise on the one side is negative, and is to refrain from doing something perpetually while the covenant or promise on the other side is to pay money at a day named, as it is impossible that the former should be fully performed before the money is payable, both sides of the contract will be deemed independent and absolute.

⁹ *Northrup v. Northrup*, 6 Cow. (N. Y.) 296; *Tracy v. Albany Exchange Co.*, 7 N. Y. 472; *Hamilton v. Home Ins. Co.*, 137 U. S. 370; *Brusie v. Peck Bros. & Co.*, 14 U. S. App. 21; *Loud v. Pomona Land & Water Co.*, 153 U. S. 564.

¹⁰ *Hapgood v. Shaw*, 105 Mass. 276.

"6. When each side of a bilateral contract is put into a separate instrument, each being complete in itself, and neither making any reference to the other, each will be independent and absolute. In fact, there are in that case two separate and distinct contracts, and it is erroneous to say that the two instruments constitute one bilateral contract; and it seems that parol evidence is not admissible to connect them together.

"7. When the covenant or promise on the one side is to pay a fixed sum of money or to do some other act, and on the other side to guarantee a debt or insure against some risk or contingency, both sides of the contract will be independent and absolute; for although the covenant or promise on the one side is the equivalent of the covenant or promise on the other side, yet there is no equivalency in the performance. In such cases the covenant or promise on the one side to insure or guarantee is the full equivalent for actual performance on the other side.

"8. The most important distinction applicable to the general rule under consideration is that between a breach of an implied condition *in limine* and a breach after a part performance of the contract by the party committing the breach. In the former case the breach will be fatal to any action on the contract by the party committing it, without regard to its extent or importance; while in the latter case nothing but a breach which goes to the substance, essence or root of the contract, or which defeats the main scope and object of the contract, will be a defense to an action on the contract by the party committing the breach.

"9. If, after a breach of an implied condition by one party, the other chooses to go on with the contract, as if no breach had happened, he thereby waives the breach as a breach of condition, though he may still sue upon it as a breach of contract.

"10. It follows from the terms of the general rule under consideration, as well as from the reason on which it is founded, that it is wholly inapplicable to a contract which is only partly bilateral, i. e., to a contract in which a part of the equivalent on one or both sides is given and received when the contract is made.

"It will be observed that this is a different principle from that of part performance referred to in Rule 8. When the present rule is applicable, the covenants or promises are wholly independent, and hence the distinction between a breach which does and which does not go to the essence is irrelevant. It is also distinct from waiver, referred to in Rule 9.

"11. As there are no implied conditions in contracts only partly bilateral, *a fortiori* there are none in contracts wholly unilateral.

"12. When a bilateral contract is in writing, and performance by A is in terms made conditional upon performance by B, while B's promise is in terms absolute and unconditional, there is no room for implying a condition in B's promise, the maxim *expressum facit cessare tacitum* being applicable. The mutual promises, therefore, do not constitute mutual and concurrent conditions, according to the general rule; but A's promise is subject to an express condition precedent, while B's promise is independent.

EXPRESS CONDITIONS.

"An express condition is one of which the evidence must be found in the language of the parties when read in the light of surrounding circumstances. As the only foundation of express condition is the intention of the parties in each case, and as the power of the parties to create them is practically unlimited, they are not susceptible of classification like implied conditions, nor can they be reduced to any definite rules. Still, certain rules may be laid down respecting them, which will be of material service in dealing with them.

"1. The rules given heretofore for implied conditions do not apply to express conditions, with the exception of the rule as to waiver, which applies to both classes of condition equally.

"2. Unlike implied conditions, express conditions may exist equally in bilateral contracts and in unilateral contracts; and it is immaterial whether there are also implied conditions in the same contract.

"3. While the subject matter of an implied condition is always a covenant or promise, the words or clause in which an express condition is found may or may not constitute also a covenant or promise, according to the intention of the parties.

"4. Whenever it is doubtful whether certain words do or do not constitute an express condition, it is material to inquire whether they constitute a covenant or promise; for if they do not, that will be an argument in favor of their being a condition, it being a cardinal rule of interpretation to give effect in some way to all the words of a contract, if it be possible; and the argument becomes much stronger when a covenantor or promisor would otherwise have no remedy for the equivalent of his covenant or promise.

"5. When a policy of insurance against fire contains a condi-

tion requiring the insured to give notice or furnish proofs of his loss, such condition is always express; for even if the policy contained a covenant or promise by the insured to give such notice or furnish such proofs, such covenant or promise would not constitute an implied condition, for the reason given in Rule 7, under Implied Conditions.

"6. Conditions in building contracts and the like, that the work shall be done to the satisfaction of an architect or engineer may for all practical purposes be regarded as express conditions; for although the contract may contain a covenant or promise by the builder to do the work to the satisfaction of an architect, and from such covenant or promise a condition will be implied, yet such a condition could never be broken until the contract had been in part performed, and the breach could not, in the nature of things, go to the essence of the contract. Unless the condition were expressed, therefore, it would be of no real value.

"7. In leases and deeds of conveyance, words naturally importing an express condition have sometimes been disregarded by the courts, it being held that they were inserted as words of form, and without any intention of creating a condition.

"8. A covenant or promise which constitutes an implied condition may, of course, be made also an express condition, if the parties so desire; and sometimes this happens from the relation of mutual covenants or promises to each other. Thus, in an agreement for the purchase and sale of unspecified goods, if the seller promise that the goods shall be of a certain quality, the buyer's promise to buy the goods and pay for them is in the nature of things conditional upon the goods being of the quality designated. For most purposes it will not be material to inquire whether such condition is express or implied, but if it ever becomes material, it seems that it is express as well as implied.

"9. It seems that the conditions in policies of marine insurance, commonly called warranties, unlike such conditions in charter-parties, are express conditions; and hence they must always be performed literally."

(d) Divisible Promises.

A contract cannot, in general, be divided in such a manner that an action may be brought, or a right accrue, on a part of it.¹¹ But some contracts are susceptible of division: for instance, when a

reversioner sells a part of the reversion to one man and a part to another, each shall have an action for his share of the rent which may accrue on a contract to pay a particular rent to the reversioner.¹² But when it is to do several things at several times, an action will lie upon every default.¹³ Contracts best illustrating divisible promises are those for the sale of goods and payment for same by instalments.

1. In such cases a default of delivery or of payment would not discharge the contract, but would be subject to an action for damages.

2. The contract is entire. The subsidiary provisions as to periodical delivery or payment do not render it divisible.¹⁴

3. If the failure of performance on the part of one party amounts to a renunciation of the contract or so goes to the root of it that the contract loses its value to the other party, he is discharged.¹⁵

4. In a charter-party containing a promise to load a *complete* cargo, the contract is divisible and is not discharged by a failure to give a full cargo. The charterer must pay the freight in proportion to the amount of the delivery and he may have his action for the short delivery.¹⁶

5. In a contract for the purchase of goods by description, when the buyer has no chance of examining them, there is an implied condition that they agree with the description,¹⁷ that they are fit for the purpose for which they were purchased,¹⁸ and that they are of merchantable quality.¹⁹ These conditions are of the essence of the agreement and their non-performance constitutes a failure of consideration. The property in them has not passed to the purchaser.

¹² 3 Whart. 404.

¹³ 15 Pick. 409; 1 Me. 316; 6 Mass. 344.

¹⁴ *Pope v. Porter*, 102 N. Y. 366; *Higgins v. Delaware etc. Ry. Co.*, 60 N. Y. 553; *Norrington v. Wright*, 115 U. S. 188; *Barrie v. Earle*, 143 Mass. 1; *Rugg v. Moore*, 110 Pa. St. 236; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255.

¹⁵ *Gibney v. Curtis*, 61 Md. 192; *Bollman v. Burt*, ib. 415; *Withers v. Reynolds*, 2 B. & A. 882.

¹⁶ *Gill v. Johnstown Lumber Co.*, 151 Pa. St. 534; *Ritchie v. Atkinson*, 10 East, 308.

¹⁷ *Pope v. Allis*, 115 U. S. 363.

¹⁸ *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108.

¹⁹ *Murchie v. Cornell*, 155 Mass. 60.

6. Where the title has not passed to the buyer, the decisions differ. On the one hand it is held that the purchaser may elect to reject the goods and recover damages for the breach of the contract or he may accept them and recover damages for the breach of the implied warranty.²⁰ On the other hand it is held that the implied condition or warranty will not survive the acceptance of the goods.²¹

The New York rule seems to be that an implied condition or warranty arising from sale by description will not survive acceptance,²² while one arising from sale by sample will survive.²³

7. Where the goods purchased are identified and agreed upon at the time the purchase is made, the property in them passes to the buyer and he cannot reject them later if they conform to the description given at the time the contract was made.²⁴

8. Where the title has passed to the buyer, as in the previous case, the American decisions differ. Some courts hold that he is not discharged, that he cannot refuse the goods, but may bring an action for the money paid on the contract in excess of the value of the goods and for damage sustained by breach of warranty.²⁵

(c) Warranties.

A warranty is an express or implied statement of something which a party undertakes shall be a part of a contract, and which, though part of the contract, is collateral to the express part of it.²⁶

The various promises in the agreement may differ in importance; some may be vital while others are subsidiary or collateral to the main promise. If the intent of the parties was to regard a promise as essential or vital to the contract, then it is a condition; but if the intent was not to regard it as essential, then it is a warranty. Hence we see that a failure of a condition discharges the contract while a failure of a warranty gives rise only to damages.

1. A condition may change its nature during the performance of a contract. If a breach of it which would have resulted in a

²⁰ *Pope v. Allis*, 115 U. S. 363; *English v. Spokane Comm. Co.*, 57 Fed. Rep. 45.

²¹ *Haase v. Nonnemacher*, 21 Minn. 486; *McClure v. Jefferson*, 54 N. W. Rep. (Wis.) 777.

²² *Coplay Iron Co. v. Pope*, 108 N. Y. 232.

²³ *Zabriskie v. Central Vt. R.*, 131 N. Y. 72.

²⁴ *Wolcott v. Mount*, 36 N. J. L. 262.

²⁵ Accord: *Freyman v. Knecht*, 78 Pa. St. 141. Contra: *Bryant v. Isburg*, 13 Gray (Mass.) 607.

²⁶ 60 N. Y. 450.

discharge of the contract is waived by the promisee and he goes on with performance, the condition becomes a warranty.²⁷

2. Where the plaintiff has in good faith attempted to perform the conditions, he is generally allowed to recover for benefits conferred less the damage for non-performance of the whole.²⁸

(f) *Damages.*

Damages constitute the indemnity recoverable by a person who has sustained an injury, either in his person, property, or relative rights, through the act of another.

"The broad general rule is that the injured party is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed.

"The familiar rules on the subject are all subordinate to these. For instance: that the damages must flow directly and naturally from the breach of contract, is a mere mode of expressing the first; and that they must not be the remote but the proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last."²⁹

1. Where there has been a breach of contract and one of the parties sustains a loss, he is entitled to money damages in so far as that will go toward placing him in the position in which he would have been had the contract been performed.³⁰

2. If the plaintiff has suffered no loss, he may still have a verdict in his favor and nominal damages—which is a sum of money which may be spoken of but which has no existence in point of quantity.

3. If a loss results from the breach of a contract which was not in the minds of the parties when the contract was made, the amount of damages will be such as would naturally flow from such a

²⁷ *Graves v. Legg*, 9 Exch. 717.

²⁸ Accord: *Gove v. Island City Co.*, 19 Ore. 363; *Dermott v. Jones*, 2 Wall (U. S.) 1. Contra: *Catlin v. Tobias*, 26 N. Y. 217.

²⁹ *Griffin v. Colver*, 16 N. Y. 489.

³⁰ *Robinson v. Harmon*, 1 Exch. 855.

breach. A special loss which would not naturally flow from the breach must be stated in express terms if it is to be recovered.³¹

4. With the exception of the breach of promise of marriage, damages for the breach of a contract are not punitive, only compensatory.

5. The damages for a breach are often stated by the parties in express terms in the contract. Whether the courts will deem them a penalty or liquidated damages will depend upon whether the amount approximates the actual damage or not.

6. An injured party must exercise reasonable care not to increase his damages.³²

7. A party is entitled to damages even though it is difficult to assess them.³³

(g) Methods of discharging the right of action arising upon a breach of contract.

As soon as a breach occurs a right of action arises in favor of the injured party. He may begin suit at once, as we have seen in some of the previous rules, or he may defer litigation for a time; the right of action still subsisting and continuing until discharged. As a general rule, at any intermediate date between the day the cause of action arises and the day it is discharged the injured party may bring suit.

1. Discharge may take place by consent of the parties either by a release or by accord and satisfaction. If by release or waiver, it should be made under seal; otherwise it would be a promise without consideration to support it.³⁴ Bills and notes are exceptions to the rule. If discharge takes place by accord and satisfaction, the plaintiff must receive consideration for his promise not to sue and it must be made in his favor.³⁵

2. The remedy growing out of the right of action may be barred by the lapse of time; this bar is imposed by the Statute

³¹ *Rochester Lantern Co. v. Stiles etc. Co.*, 135 N. Y. 209; *Fox v. Boston etc. R.*, 148 Mass. 220; *Wolcott v. Mount*, 36 N. J. L. 262.

³² *Parsons v. Sutton*, 66 N. Y. 92; *Clark v. Marsiglia*, 1 Denio (N. Y.) 317.

³³ *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205; *Beeman v. Banta*, 118 N. Y. 538; *Swain & Schieffelin*, 134 N. Y. 471.

³⁴ *Hale v. Spaulding*, 145 Mass. 482; *Pierce v. Parker*, 4 Met. (Mass.) 80; *Collyer v. Moulton*, 9 R. I. 90.

³⁵ *Kromer v. Heim*, 75 N. Y. 574; *McCreery v. Day*, 119 N. Y. 1.

of Limitation. The right of action does not die, and if in any way the bar is removed the right of action revives.³⁶

3. A right of action may be discharged by a judgment of the court. The right is merged into a so-called contract of record.³⁷ When judgment is so given in one court upon the merits of the case, either by consent or by decision of the court, the judgment discharges the obligation by estoppel and the plaintiff cannot bring another action for the same cause as long as the judgment stands.³⁸

CASES.

SECTION III.—DISCHARGE BY BREACH.

Discharge by the renunciation of the contract before the performance is due.

WINDMULLER *et al.* v. POPE *et. al.*

107 NEW YORK, 674.—1887.

This was an action to recover damages for alleged breach of a contract to purchase a quantity of iron. Verdict for plaintiffs. Judgment affirmed at General Term.

In January, 1880, the parties entered into a contract for the sale by plaintiffs and purchase by defendants of "about twelve hundred tons old iron, Vignol rails, for shipment from Europe at sellers' option, by sail or steam vessels to New York, Philadelphia, or Baltimore, at any time from May 1 to July 15, 1880, at thirty-five dollars per ton, . . . deliverable in vessels at either of the above ports on arrival." On or about June 12, 1880, defendants notified plaintiffs that they would not receive or pay for the iron, or any part of it, and advised that plaintiffs better stop at once in attempting to carry out the contract. Plaintiffs thereupon sold the iron abroad which they had purchased to carry out the contract.

Per Curiam. We think no error is presented upon the record

³⁶ *Campbell v. Holt*, 115 U. S. 620.

³⁷ *Miller v. Covert*, 1 Wend. (N. Y.) 487; *Vanuzem v. Burr*, 151 Mass. 386.

³⁸ *Nashville etc. Ry. v. United States*, 113 U. S. 261; *Gould v. Sternberg*, 128 Ill. 510.

which requires a reversal of the judgment. The defendants having on the 12th of June, 1880, notified the plaintiffs that they would not receive the iron rails or pay for them, and having informed them on the next day that if they brought the iron to New York they would do so at their own peril, and advised them that they had better stop at once attempting to carry out the contract, so as to make the loss as small as possible, the plaintiffs were justified in treating the contract as broken by the defendant at that time, and were entitled to bring the action immediately for the breach, without tendering the delivery of the iron, or awaiting the expiration of the period of performance fixed by the contract; nor could the defendants retract their renunciation of the contract after the plaintiffs had acted upon it, and by a sale of the iron to other parties changed their position. *Dillon v. Anderson*, 43 N. Y. 231; *Howard v. Daly*, 61 Id. 362; *Ferris v. Spooner*, 102 Id. 12; *Hochster v. De La Tour*, 2 El. & Bl. 678; *Cort v. Ambergate & Co. Railway Co.*, 17 Ad. & El. 127; *Crabtree v. Messersmith*, 19 Ia. 179; Benjamin on Sales, §§ 567, 568.

The ordinary rule of damages in an action by a vendor of goods and chattels, for a refusal by the vendee to accept and pay for them, is the difference between the contract price and the market value of the property at the time and place of delivery. *Dana v. Fiedler*, 12 N. Y. 40; *Dustan v. McAndrew*, 44 Id. 72; *Cahen v. Platt*, 69 Id. 348.

* * * * *

All concur.

Judgment affirmed.³⁰

DINGLEY *et al.* v. OLER *et al.*

117 UNITED STATES, 490.—1886.

Assumpsit for damages for alleged breach of contract. Judgment for plaintiffs. Writs of error by both parties.

Plaintiffs, in 1879, sold defendants a quantity of ice to be returned by defendants the following year. Ice was then worth fifty cents a ton. Next season, in July, when ice was worth five dollars a ton, plaintiffs demanded a return of the amount delivered. Defendants replied: "We must, therefore, decline to ship the ice

³⁰ See also *Kurtz v. Frank*, 76 Ind. 594.

for you this season, and claim as our right to pay you for the ice in cash at the price you offered other parties here (that is, fifty cents), or give you ice when the market reaches that point." In answer to another demand defendants replied in substance the same and asked for a reply or a personal interview. Plaintiffs thereupon, without waiting for the end of the season, commenced this action.

MR. JUSTICE MATTHEWS. We differ, however, from the opinion of the Circuit Court that the defendants are to be considered, from the language of their letters above set out, as having renounced the contract by a refusal to perform, within the meaning of the rule which, it is assumed, in such a case, confers upon the plaintiffs a right of action before the expiration of the contract period for performance. We do not so construe the correspondence between the parties. In the letter of July 7th, the defendants say: "We must, therefore, decline to ship the ice for you this season, and claim, as our right, to pay you for the ice, in cash, at the price you offered it to other parties here, or give you ice when the market reaches that point." Although in this extract they decline to ship the ice that season, it is accompanied with the expression of an alternative intention, and that is, to ship it, as must be understood, during that season, if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them. It was not intended, we think, as a final and absolute declaration that the contract must be regarded as altogether off, so far as their performance was concerned, and it was not so treated by the plaintiffs. For, in their answer of July 10th, they repeat their demand for delivery immediately, speak of the letter of the 7th instant as asking "for a postponement of the delivery," urge them "to fill our order," and close with "hoping you (the defendants) will take a more favorable view upon further reflection," etc. Here, certainly, was a *locus penitentiae* conceded to the defendants by the plaintiffs themselves, and a request for further consideration, based upon a renewed demand, instead of abiding by and standing upon the previous one.

Accordingly, on July 15th, the defendants replied to the demand for an immediate delivery to meet the exigency of the plaintiffs' sale of the same ice to others, and the letter is evidently and expressly confined to an answer to the particular demand for a delivery at that time. They accordingly say: "Now you ask us at a time when we are pressed by our sales and by short supply threatening

us and others, to deliver to you the equivalent in tons of the ice taken from you under the circumstances stated. This does not seem to us to be fair," etc. "We cannot, therefore, comply with your request to deliver to you the ice claimed, and respectfully submit that you ought not to ask this of us in view of the fact stated herein and in ours of the 7th." This, we think, is very far from being a positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time. In view of the consequences sought to be deduced and claimed as a matter of law to follow, the defendants have a right to claim that their expressions, sought to be converted into a renunciation of the contract, shall not be enlarged by construction beyond their strict meaning.

The view taken by the Circuit Court of the correspondence and conduct of the parties, and which we hold to be erroneous, brought the case within the rule laid down by the English courts in *Hochster v. De La Tour*, 2 El. & Bl. 678; *Frost v. Knight*, L. R. 7 Ex. 111; *Danube & Black Sea Railway Co. v. Xenos*, 11 C. B. N. S. 152; and which, in *Roper v. Johnson* (L. R. 8 C. P. 167, 168) was called a novel doctrine; followed by the courts of several of the States (*Crabtree v. Messersmith*, 19 Iowa, 179; *Holloway v. Griffith*, 32 Iowa, 409; *Fox v. Kitton*, 19 Ill. 519; *Chamber of Commerce v. Sollitt*, 43 Ill. 519; *Dugan v. Anderson*, 36 Maryland, 567; *Burtis v. Thompson*, 42 N. Y. 246); but disputed and denied by the Supreme Judicial Court of Massachusetts in *Daniels v. Newton* (114 Mass. 530) and never applied in this court. Accordingly, the right to maintain the present action was justified upon the principle supposed to be established by those cases.

The construction we place upon what passed between the parties renders it unnecessary for us to discuss or decide whether the doctrine of these authorities can be maintained as applicable to the class of cases to which the present belongs; for, upon that construction, this case does not come within the operation of the rule involved.

In *Smoot's Case* (15 Wall. 36) this court quoted with approval the qualification stated by Benjamin on Sales (1st ed. 424, 2d ed. § 568) that,

"A mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he

afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end."

We do not find any such refusal to have been given or acted upon in the present case, and the facts are not stronger than those in *Avery v. Bowden* (5 El. & Bl. 714; S. C. 6 El. & Bl. 953), which were held not to constitute a breach or renunciation of the contract. The most recent English case on the subject is that of *Johnstone v. Milling*, in the Court of Appeal (16 Q. B. D. 460), decided in January of the present year, which holds that the words or conduct relied on as a breach of the contract by anticipation must amount to a total refusal to perform it, and that that does not by itself amount to a breach of the contract unless so acted upon and adopted by the other party.

The present action was prematurely brought before there had been a breach of contract, even in this sense, by the defendants, for what they said on July 15th amounted merely to a refusal to comply with the particular demand then made for an immediate delivery.

The judgment is accordingly reversed upon the writ of error sued out by the defendants below, and the cause remanded, with instructions to take further proceedings therein according to law; and upon the writ of error of plaintiffs below judgment will be given that they take nothing by their writ of error.

Performance made impossible by one party before it was due.

WOLF v. MARSH.

54 CALIFORNIA, 228.—1880.

Action on an instrument in writing. Judgment for plaintiff. Defendant appeals.

The instrument was as follows:

"MARTINEZ, November 24th, 1866.

"For value received, I promise to pay to S. Wolf, or order, four hundred and forty-nine dollars, with interest at one per cent per month from date until paid, principal and interest payable in United States gold coin. This note is made with the express understanding that if the coal mines in the Marsh Ranch yield no profits to me, then this note is not to be paid, and the obligation herein expressed shall be null and void.

"C. P. MARSH."

On November 1, 1871, defendant conveyed his interest in the ranch to one Williams. Up to that date the mines had yielded defendant no profits.

SHARPSTEIN, J. Before the mines had yielded any profits to the defendant, he sold and conveyed his interest in them to a stranger. By so doing he voluntarily put it out of his power ever to realize any profits from the mines. However great the yield of profits from them might be after that, they could yield none to him. And the principle is elementary, that, "if one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor, without demand, even though the time specified for performance has not expired." Bishop on Cont., § 690 (1426).

That this case is within that principle, we do not entertain a doubt. When the note was executed, the defendant was a half owner of the mines, which were leased on such terms that the production of coal from them must have yielded him a profit. After making the note, he voluntarily committed an act which made it impossible for the contingency upon which the note would become due and payable ever to arise. When he did that, he violated his contract, and the note at once became due and payable; and as this action was commenced within four years after that, it follows that the judgment and order of the court appealed from must be affirmed.⁴⁰

Renunciation during performance.

HALE *et al.* v. TROUT *et al.*

35 CALIFORNIA, 229.—1868.

Action for contract price of lumber delivered, and for damages for breach of contract by defendants in declaring the contract at an end and refusing to receive any more lumber under it. Judgment for plaintiffs for lumber delivered, but not for breach. Plaintiffs appeal.

⁴⁰ Accord: *Cape Fear &c. Nav. Co. v. Wilcox*, 7 Jones' L. (N. C.) 481; *United States v. Peck*, 102 U. S. 64.

SAWYER, C. J. Conceding a breach to have occurred on the part of the defendants, it is claimed on their behalf that the plaintiffs had but one of three courses to pursue: firstly, to rescind the contract and sue for the value of the lumber delivered; secondly, proceed to manufacture and tender the lumber, and sue upon the contract from month to month for a corresponding amount of the contract price; or, thirdly, proceed to manufacture and tender the lumber according to the terms of the contract, till the whole two million feet should be delivered or tendered, and then sue for the entire amount at once. And the court below must either have adopted this theory, or have rendered judgment upon the hypothesis that the only breach on the part of the defendants consisted in not paying for a part of the lumber delivered and accepted, and that such non-payment did not constitute a breach of the contract entitling the plaintiffs to damages beyond the price of the amount of lumber delivered and received, but not paid for. But if it be conceded that plaintiffs were entitled to go on manufacturing and tendering the lumber, and then sue for the contract price, as suggested, as to which there may be some doubt (see *Clark v. Margisaglia*, 1 Den. 318; *Derby et al v. Johnson et al.*, 21 Vt. 22), it is clear, both on principle and authority, that the plaintiffs were entitled to pursue another course, the one adopted in this action; that is to say, to treat the contract as wholly broken by the defendants, and sue to recover, firstly, the contract price for the lumber actually delivered and received under the contract; and, secondly, upon the breach to recover the entire damages resulting from the breach on the part of defendants in putting an end to and refusing to receive any more lumber under the contract.

It may be that the monthly payments called for by the contract were absolutely necessary to enable the plaintiffs to perform their covenants, and that without such payments it would have been impossible for them to proceed. It would require a large amount of capital for plaintiffs to proceed in the manufacture of lumber for a period of three years without receiving payments. Besides, they were compelled to erect, and did erect, a new mill for the express purpose of enabling them to fulfill their contract. It would be equally onerous to be compelled to sue each month, and recover the amount of the several monthly payments at the end of a protracted law suit. They were not bound to do so under the terms of their contract. There was not merely a neglect of payment, but they were notified by the defendants that they should treat the contract

as at an end, and would receive no more lumber under it. Defendants thereby prevented the plaintiffs from fulfilling their contract. The plaintiffs, after this, even if they would be justified in so doing, could not be required, as a condition precedent to obtaining adequate relief for the breach, to go on manufacturing lumber at the risk of finding no market for it or of being unable to collect from the defendants the amounts that might become due under the contract. There was a total breach of an entire contract, and the plaintiffs were entitled to sue upon the breach immediately, and recover the entire damages resulting from it, without waiting for the time for full performance to elapse. The following authorities sustain this view: *Shaffer v. Lee*, 8 Barb. 415; *Masterton v. Mayor of Brooklyn*, 7 Hill, 61; *Clark v. Mayor of N. Y.*, 4 N. Y. (4 Comst.) 343; *Royalton v. R. and W. Turnpike Co.*, 14 Vt. 311; *Derby v. Johnson*, 21 Vt. 22; *Jones v. Judd*, 4 N. Y. 414; *Phil. and Balt. R. R. Co. v. Howard*, 13 Howard, U. S. 313, 314, 344; *Fish v. Folley*, 6 Hill, 55; *Shannon v. Comstock*, 21 Wend. 460; *Seaton v. Second Municipality of New Orleans*, 3 La. Am. R. 45; *Rogers v. Parham*, 8 Cobb, Ga. 190; *Planché v. Colburn*, 8 Bing. 15; *Clossman v. Lacoste*, 28 Eng. L. and Eq. 141.

The case of *Masterton v. Mayor of Brooklyn*, *supra*, was similar in principle to this. The suit was for a breach of a contract, whereby the plaintiff covenanted to furnish for a specified price, all the marble required to build the city hall in the city of Brooklyn, to be delivered from time to time, as required by the superintendent, and paid for in installments as the work progressed. After the delivery of something over fourteen thousand feet, which was paid for, the defendants suspended the work, and like the defendants in this case, "refused to receive any more materials from the plaintiffs, though the latter were ready, and offered to perform." At the time of the suspension of the work, the entire quantity of marble remaining to be delivered, in order to fulfill the contract, was about eighty-nine thousand feet. Plaintiff claimed, and, in an action for damages on the breach, was allowed to prove, against the objection of the defendants, the difference between the cost of furnishing the marble and the contract price. This ruling presented one of the questions for determination on appeal, and it was decided in favor of the plaintiff. Mr. Chief Justice Nelson, in discussing the question, says:

"When the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that

light, the market price on the day of the breach is to govern in the assessment of damages. . . . If there was a market value of the article in this case, the question would be a simple one. As there is none, however, the parties will be obliged to go into an inquiry as to the actual cost of furnishing the article at the place of delivery." 7 Hill, 71, 72.

And this is what was done in the case now under consideration. And Mr. Justice Beardsley says:

"The plaintiffs were not bound to wait till the period had elapsed for the complete performance of the agreement, nor to make successive offers of performance in order to recover all their damages. They might regard the contract as broken up, so far as to absolve them from making further efforts to perform, and give a right to recover full damages, as for a total breach." *Id.* 75.

In the case of the *Town of Royalton v. R. & W. Turnpike Co.*, there was a contract, by the terms of which the defendant covenanted to support and keep in repair for the term of twenty years a bridge which the plaintiff was bound to maintain, in consideration of which the plaintiff covenanted to pay the defendant the sum of twenty-five dollars per annum for the entire period of time. The defendant supported the bridge for a period of eight years, and then committed a breach by suffering it to go to decay, and refusing to support it longer. The suit was upon the contract for the breach, and it was held that the plaintiff was entitled to recover full damages, covering the entire twelve years yet unexpired, at the time of the commencement of the suit. The court, by Redfield, J., say:

"The rule of damages in this case should have been to give the plaintiffs the difference between what they were to pay the defendant and the probable expense of performing the contract, and thus assess the entire damages for the remaining twelve years." 14 Vt. 324.

So in *Phil., Wil. and Balt. R. R. Co. v. Howard*, upon a contract for grading and doing certain work on a railroad, in which it was provided that "in case the party of the second part at any time be of opinion that this contract is not duly complied with by the party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular or negligent, then and in such case he shall be authorized to declare this contract forfeited, and thereupon the same shall be null." 13 How. 319. Sub-

sequently, on the statement of the engineer that the contract was "not in due progress of execution," after reciting that the party of the first part had not complied with the contract, it was by the company "resolved that the said contract be and the same is hereby declared to be forfeited." *Id.* 313. Plaintiff sued, and one of the breaches relied on was for "fraudulently declaring the contract forfeited, and thereby depriving plaintiff of the gains which would otherwise have accrued to him on the completion of the contract." *Id.* 313. The court instructed the jury to the effect that if the company annulled the contract, not for the reasons stated, but for the purpose of having the remaining work done cheaper than the contract price, the plaintiff was entitled to recover damages for the loss of profit sustained by the refusal of the company to permit him to finish the work contracted to be performed. In considering the rule of damages, the Supreme Court, per Curtis, J., say:

"Actual damages clearly include the direct and actual loss which plaintiff sustains *propter rem ipsam non habitam*. And in case of a contract like this that loss is, among other things, the difference between the cost of doing the work and the price paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it, when the other party has broken the contract, and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. . . . We hold it to be a clear rule that a gain or profit of which the contractor was deprived by the refusal of the company to allow him to proceed with and complete the work was a proper subject of damages." *Id.* 344.

In *Clark v. Mayor of New York* (4 New York, 343) the court say:

"But when the contract is terminated by one party against the consent of the other, the latter will not be confined to the contract price, but may bring his action for a breach of the contract, and recover as damages all that he may lose by way of profits in not being allowed to fulfill the contract; or he may waive the contract and bring his action on the common counts for work and labor generally, and recover what the work done is actually worth. But in the latter case, he will not be allowed to recover as damages anything for speculative profits, but the actual value of the work and materials must be the rule of damages. . . . If the party seeks to recover more than the actual worth of this work, in a case where he is prevented from performing the entire contract, he must resort to his action directly upon the contract."

And in *Jones v. Judd* (4 N. Y. 414) the court say:

“If the performance had been arrested by the act or omission of the defendants, the plaintiff would have had his election to treat the contract as rescinded, and recover, on a *quantum meruit*, the value of his labor, or he might sue upon the agreement and recover for the work completed, according to the contract, and for the loss in profits or otherwise which he had sustained by the interruption.”

Now, what was done and what was said might be done in the cases cited, is precisely what was done in the case under consideration. The plaintiffs sued directly upon the contract, to recover the contract price for the lumber delivered and received, and directly upon the contract for the breach in declaring the contract at an end and refusing to take any more lumber under it. And the foregoing cases show that they may so sue and recover the whole damage sustained in consequence of the breach, without waiting for the time of performance to elapse or repeating an offer to perform from month to month, as the time for delivery arrives, and that the rule of damages upon the breach is the clear profit which the plaintiffs would have made, that is to say, the difference between the contract price and what it would have cost the plaintiffs to manufacture and deliver the lumber according to the terms of the contract.

The cases cited by defendants are not in conflict with the authorities referred to in this opinion. Most of them do not touch the precise question, and are therefore not in point. The case of *Rogers v. Parham* (8 Cobb, 190) is against the respondents, and sustains the views here taken. The same may be said of *Girard v. Taggart* (5 S. & R. 19) so far as it bears upon the question. There was a sale of teas at auction, to be paid for in sixty, ninety, and one hundred and twenty days, the purchaser, on delivery of the teas, to give notes with approved indorsers. The purchaser finally refused to take the teas or give the notes. Thereupon the vendor sold the teas again at a much lower price, and sued at once to recover the difference. In the language of the chief justice, the action was “special, on the breach of the contract.” Upon the question as to when the action could be brought, and the measure of damages, Mr. Justice Gibson said:

“The breach having put an end to every idea of further performance by either is a violation of the contract in all its parts, for which the seller may recover whatever damages he can prove he has sustained. The buyer,

after having disaffirmed the sale, so far as he could by acts of his own, must not be permitted to treat the contract as still existing, for the purpose of being performed by him specifically. But the seller may, if he please, consider it existing only for the purpose of giving a remedy for the breach." 5 S. & R. 33.

See also opinion of Mr. Justice Duncan in same case (*Id.* 543); also *Derby et al v. Johnson et al.*, 21 Vt. 22. Some principles stated in *Fowler v. Armour* (24 Ala. 194) seem to be favorable to respondents' view, but if so they are wholly against the current of authorities brought to our notice.

In this case the difference between the contract price and cost of performance, or the clear profits upon the amount of lumber remaining undelivered, the court found to be \$6304.79, which sum should have been added to the amount for which judgment was rendered.

Judgment reversed, and the District Court directed to enter judgment upon the findings in accordance with the views expressed in this opinion.⁴¹

⁴¹ "When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a *quantum meruit*. There is then no question of losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is, the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed. It does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services), after making allowance for the value of materials on hand; at least it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses of the party injured have been extravagant, and unnecessary for the purpose of carrying out the contract. . . .

"It is to be observed that when it is said in some of the books, that when one party puts an end to the contract, the other party cannot sue on the contract, but must sue for the work actually done under it, as upon a *quantum meruit*, this only means that he cannot sue the party in fault upon the stipulations contained in the contract, for he himself has been prevented from performing his own part of the contract upon which the stipulations depend. But surely, the wilful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the

DERBY *et al.* v. JOHNSON *et al.*

21 VERMONT, 17.—1848.

Book account. Judgment for plaintiffs. Exceptions by defendants.

Plaintiffs contracted to do the stone work, masonry and blasting on three miles of railroad, defendants to pay specified prices per cubic yard. After working a month, plaintiffs were directed by defendants to cease further work, and complied. Plaintiffs presented an account of days' labor and material furnished by them, which was allowed on the basis of reasonable value.

HALL, J. It is insisted, in behalf of the defendants, that the request and direction of the defendants to the plaintiffs, to cease work and abandon the execution of the contract, is to be considered in the light of a proposition to the plaintiffs, which they were at liberty to accede to, or disregard, and that, having acquiesced in it by quitting the work, the contract is to be treated as having been relinquished by the mutual consent of the parties. But we do not look upon it in that light. The direction of the defendants to the plaintiffs to quit the work was positive and unequivocal; and we do not think the plaintiffs were at liberty to disregard it. In *Clark v. Marsiglia* (1 Denio, 317) it was held, that the employer, in a contract for labor, had the power to stop the completion of it if he chose—subjecting himself thereby to the consequences of a violation of his contract; and that the workman, after notice to quit

contract for which an action will lie for the recovery of all damage which the injured party has sustained. The distinction between those claims under a contract which result from a performance of it on the part of the claimant, and those claims under it which result from being prevented by the other party from performing it, has not always been attended to. The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred.'—Mr. Justice Bradley in *United States v. Behan*, 110 U. S. 338, 345-7. See also *Danforth v. Tennessee &c. Ry. Co.*, 93 Ala. 614; *Nichols v. S. S. Co.*, 137 N. Y. 471.

That there may be such conduct on the part of the defendant as to warrant the plaintiff in rescinding the contract and recovering on a *quantum meruit*, and yet not warrant him in regarding the contract as renounced by the defendant so as to sustain an action for damages for a breach, see *Wharton v. Winch*, 140 N. Y. 287.

work, had not the right to continue his labor and claim pay for it. And this seems to be reasonable. For otherwise the employer might be entirely ruined, by being compelled to pay for work, which an unexpected change of circumstances, after the employment, would render of no value to him. If, for instance, in this case the location of the railroad had been changed from the place where the work was contracted to be done, or if the plaintiffs' [defendants'?] employers had become wholly insolvent after the making of the contract, the injury to them, if they had no power to stop the work, might be immense and altogether without remedy. Rather than an injury so greatly disproportioned to that which could possibly befall the workman should be inflicted on the employers, it seems better to allow them to stop work, taking upon themselves; of course, all the consequences of such a breach of their contract. Such, we think, is and ought to be the law. We are therefore satisfied that the plaintiffs were prevented from executing their contract by the act of the defendants, and that the contract is not to be treated as having been mutually relinquished.

Treating the plaintiffs as having been prevented from executing their part of the contract by the act of the defendants, we think the plaintiffs are entitled to recover, as upon a *quantum meruit*, the value of the services they had performed under it, without reference to the rate of compensation specified in the contract. They might doubtless have claimed the stipulated compensation, and have introduced the contract as evidence of the defendants' admission of the value of the services. And they might, in addition, in another form of action, have recovered their damages for being prevented from completing the whole work. In making these claims the plaintiffs would be acting upon the contract as still subsisting and binding; and they might well do so; for it doubtless continued binding on the defendants. But we think the plaintiffs, upon the facts stated in the report of the auditor, were at liberty to consider the contract as having been rescinded from the beginning, and to claim for the services they had performed, without reference to its terms.

The defendants, by their voluntary act, put a stop to the execution of the work, when but a fractional part of that which had been contracted for had been done, and while a large portion of that which had been entered upon was in such an unfinished condition as to be incapable of being measured and its price ascertained by the rate specified in the contract. Under these circumstances, we

think the defendants have no right to say that the contract, which they have thus repudiated, shall still subsist for the purpose of defeating a recovery by the plaintiffs of the actual amount of labor and materials they have expended.

In *Tyson v. Doe* (15 Vt. 571), where the defendant, after a part performance of a contract for delivering certain articles of iron castings, prevented the plaintiff from farther performing it, the contract was held to be so far rescinded by the defendant as to allow the plaintiff to sustain an action on book for the articles delivered under it, although the time of credit for the articles, by the terms of the contract, had not expired. The court in that case say, "that to allow the defendant to insist on the stipulation in regard to the time of payment, while he repudiates the others, would be to enforce a different contract from that which the parties entered into." The claim now made in behalf of the defendants, that the rate of compensation specified in the contract should be the only rule of recovery, would, if sustained, impose upon the plaintiffs a contract which they never made. They did, indeed, agree to do all the work of a certain description on three miles of road, at a certain rate of compensation per cubic yard; but they did not agree to make all their preparations and do but a sixteenth part of the work at that rate; and it is not to be presumed that they would have made any such agreement. We are not therefore disposed to enforce such an agreement against them.

The case of *Koon v. Greenman* (7 Wend. 121) is much relied upon by the counsel for the defendants. In that case the plaintiff had contracted to do certain mason work at stipulated prices, the defendant finding materials. After a part of the work had been done, the defendant neglecting to furnish materials for the residue, the plaintiff quit work and brought his action of general assumpsit. The court held he was not entitled to recover the value of the work, but only according to the rate specified. The justice of the decision is not very apparent; and it does not appear to be sustained by the authorities cited in the opinion, they being all cases, either of deviations from the contract in the manner of the work, or delays of performance in point of time. But that case, if it be sound law, is distinguishable from this in at least two important particulars. In that case the plaintiff was prevented from completing his contract by the mere negligence of the defendant; in this by his voluntary and positive command. In that case there does not appear to have been any difficulty in ascertaining the amount

to which the plaintiff would be entitled, according to the rate specified in the contract; whereas in this it is altogether impracticable to ascertain what sum would be due the plaintiffs, at the stipulated prices, for the reason that when the work was stopped by the defendants, a large portion of it was in such an unfinished state as to be incapable of measurement. That case is therefore no authority against the views we have already taken.

The judgment of the County Court is therefore affirmed.⁴²

CLARK v. MARSIGLIA.

1 DENIO (N. Y.), 317.—1845.

Assumpsit for work, labor, and material. Plea, non-assumpsit. Judgment for plaintiff. Defendant brings error.

Defendant delivered a number of paintings to plaintiff to be cleaned and repaired at a specified price for each. After plaintiff had begun work on them defendant directed him to stop, but plaintiff persisted and claims to recover for the whole. The court charged that as plaintiff had begun the work, he had a right to finish and defendant could not revoke the order.

Per Curiam. The question does not arise as to the right of the defendant below to take away these pictures, upon which the plaintiff had performed some labor, without payment for what he had done, and his damages for the violation of the contract, and upon

⁴² "When the contract is terminated by one party against the consent of the other, the latter will not be confined to the contract price, but may bring his action for a breach of the contract, and recover as damages all that he may lose by way of profits in not being allowed to fulfill the contract; or he may waive the contract and bring his action on the common counts for work and labor generally, and recover what the work done is actually worth. . . . If the party seeks to recover more than the actual worth of his work, in a case where he has been prevented from performing the entire contract, he must resort to his action directly upon the contract; but when he elects to consider the contract rescinded, and goes upon *quantum meruit*, the actual value is the rule of damages."—Pratt, J., in *Clark v. Mayor*, 4 Comstock (4 N. Y.), 338. Contra: *Doolittle v. McCullough*, 12 Ohio St. 360, where it is held that the plaintiff suing in *quantum meruit* is restricted in his recovery to the contract rate, and *Clark v. Mayor* is criticised.

Where the work is performed on the plaintiff's own material, in which

that point we express no opinion. The plaintiff was allowed to recover as though there had been no countermand of the order; and in this the court erred. The defendant, by requiring the plaintiff to stop work upon the paintings, violated his contract, and thereby incurred a liability to pay such damages as the plaintiff should sustain. Such damages would include a recompense for the labor done and materials used, and such further sum in damages as might, upon legal principles, be assessed for the breach of the contract; but the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been.

To hold that one who employs another to do a piece of work is bound to suffer it to be done at all events, would sometimes lead to great injustice. A man may hire another to labor for a year, and within the year his situation may be such as to render the work entirely useless to him. The party employed cannot persist in working, though he is entitled to the damages consequent upon his disappointment. So if one hires another to build a house, and subsequent events put it out of his power to pay for it, it is commendable in him to stop the work, and pay for what has been done and the damages sustained by the contractor. He may be under a necessity to change his residence; but upon the rule contended for, he would be obliged to have a house which he did not need and could not use. In all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted; and to persist in accumulating a larger de-

the defendant has no interest, it would seem that the only remedy is on the special contract in an action for damages for breach. *Hosmer v. Wilson*, 7 Mich. 294.

In cases where the plaintiff has fully performed his part of the contract, but the defendant refuses to perform his, the value of what the defendant promised (money, property, or services), and not the value of the plaintiff's services or property, is the measure of the recovery. *Bradley v. Levy*, 5 Wis. 400; *Anderson v. Rice*, 20 Ala. 239; *Porter v. Dunn*, 61 Hun, 310; *S. C.* 131 N. Y. 314. Contra: *Hudson v. Hudson*, 87 Ga. 678, where the court says: "It seems the fairest and best way of adjusting these matters is to allow the son to recover of the administrator, upon a *quantum meruit*, the actual value of his services, but the amount must in no event exceed the value of the home place" [promised]. *A fortiori*, the plaintiff cannot recover for part performance an amount in excess of that stipulated for full performance. *McClair v. Austin*, 17 Col. 576.

mand is not consistent with good faith towards the employer. The judgment must be reversed, and a *venire de novo* awarded.

Judgment reversed.⁴³

CONNOLLY *v.* SULLIVAN.

173 MASSACHUSETTS, 1.—1899.

Contract, to recover a balance alleged to be due plaintiff for work and labor in excavating a lot for defendant. There was an express contract under which plaintiff agreed to do the work for \$750. After the work was partly done defendant directed plaintiff to stop. The plaintiff (who was losing largely under his contract) did not object to stopping work and acquiesced in the direction. The work then done was fairly worth \$1200; to complete it was worth \$925. Defendant had paid plaintiff \$250. The worth of the

⁴³ Accord: *Dillon v. Anderson*, 43 N. Y. 231; *Butler v. Butler*, 77 N. Y. 472; *Moline Scale Co. v. Beed*, 52 Ia. 307; *City of Nebraska v. Nebraska &c. Coke Co.*, 9 Neb. 339; *Davis v. Bronson*, 2 N. Dak. 300; *Tufts v. Lawrence*, 77 Tex. 526.

“The person who has not broken his part of the compact may, at his option, extend to the person who has signified his purpose to violate the agreement, an opportunity for repentance, measured by the time to elapse between the refusal to perform and the date when performance is to commence. . . . The party keeping the contract need not mitigate the damages by treating as final a premature repudiation thereof; but this is far from establishing the proposition that he may increase the amount to be paid by the other party by completing the contract after notice of repudiation, made on the day of performance, or made before that day, and never withdrawn, but, on the contrary, constantly insisted upon down to and including that day. . . . The question in all cases is whether one party has prevented performance by the other party at the time when performance by him is due. This can be done as well by preventing the taking of those preliminary steps, without which the final step cannot be taken, as by preventing the taking of such final step. These preliminary steps must often precede by many days the time of performance, and it therefore must follow that notice of refusal to carry out the contract, in such a case, given before the time of performance, will operate as a breach of the contract in case the time has arrived at which the person willing to keep the contract may enter upon the work under the contract.”—Corliss, C. J., in *Davis v. Bronson*, 2 N. Dak. 300. See also for the distinction between repudiation before the time for performance begins and repudiation after such time, *Kadish v. Young*, 108 Ill. 170; *Roebling's Sons' Co. v. Lock Stitch Fence Co.*, 130 Ill. 660.

work done if measured by the contract price was \$425. The auditor found that if plaintiff was prevented by defendant from completing the contract he was entitled to \$950 (\$1200 less \$250 paid); if he stopped voluntarily with defendant's consent he was entitled to \$175 (\$425 less \$250 paid). At the trial the judge directed a verdict for \$950. Defendant alleged exceptions.

MORTON, J. The exceptions in this case were not only to the refusal of the court to give the rulings which were requested, but to the ruling by which the jury were directed to return a verdict for the plaintiff, irrespective of the contract price, for a sum which the auditor had found was the fair market value of all the work and labor performed and furnished, less what the defendant had paid on account; that is, as we understand the exceptions, the court ruled, in effect, as matter of law, against the objection of the defendant, that, on the auditor's report, the plaintiff was entitled to recover the amount for which the jury were directed to return a verdict, without regard to the contract price. The auditor's report was the only evidence in the case. It not only stated the general conclusions to which the auditor came, but it stated particular facts and circumstances relating to those conclusions, and we think that the defendant was entitled to go to the jury, if he so desired, on the question whether, upon the auditor's report, the plaintiff was prevented by the defendant from going on with the contract, or whether it was terminated with his consent, manifested in such a manner that the defendant was justified in acting upon it. *Peaslee v. Ross*, 143 Mass. 275; *Emerson v. Patch*, 129 Mass. 299; *Marland v. Stanwood*, 101 Mass. 470, 478.

If the former was the case, then the plaintiff would be entitled to recover, independently of the contract price, the value of the labor and materials furnished, and of which the defendant had had the benefit; and the contract price would be important or admissible only so far as it might tend to throw light, if at all, on the value of the labor and materials actually furnished. *Fitzgerald v. Allen*, 128 Mass. 232.

If the latter was the case, then we think that the plaintiff's right of recovery would be limited by the contract price, and the amount recoverable would depend on the ratio of the value of the labor and material actually furnished to what should be found to be the total cost of the work when completed according to the contract. See *Veazie v. Hosmer*, 11 Gray, 396; *Atkins v. Barnstable*, 97

Mass. 428; *Hayward v. Leonard*, 7 Pick. 181; *Koon v. Greenman*, 7 Wend. 121. In other words, in that event we think that the rule adopted by the auditor would be substantially correct.

Exceptions sustained.⁴⁴

Breach by failure of performance: absolute promises and concurrent conditions.

NORTHROP *v.* NORTHROP.

6 COWEN (N. Y.), 296.—1826.

Declaration on covenant. Demurrer to plea, and joinder.

Defendant covenanted to pay certain rent due and in arrears on a certain farm, to one Tomlinson, and to pay all that should become due on March 25, 1825, the whole to be paid on that day. Plaintiff covenanted, that on defendant's so paying the rent, he, plaintiff, would give up and discharge a certain bond and mortgage. The action was for the non-payment of the rent.

Defendant pleaded that plaintiff did not, on March 25, give up and discharge the bond and mortgage, nor tender nor offer to do so, on that day, or before, or since.

SAVAGE, C. J. The plea is bad. The payment of the money to Tomlinson, on the day specified, is clearly a condition precedent. The performance by the plaintiff of his part of the agreement is not necessarily simultaneous; but was naturally to be subsequent. A general averment of his readiness to perform is all that can be necessary or proper. To aver a tender was certainly not necessary.

Lord Mansfield, in *Jones v. Barkley* (Doug. 690), makes three classes of covenants. 1. Such as are mutual and independent,

⁴⁴ In *Wellston Coal Co. v. Franklin Paper Co.*, 57 Oh. St. 182, it is held that "the general rule is, that where full performance of a contract has been prevented by the wrongful act of the defendant, the plaintiff has the right either to sue for damages, or he may disregard the contract and sue as upon a *quantum meruit* for what he has performed," distinguishing *Doolittle v. McCullough* (12 Oh. St. 360) upon the ground that in that case the wrongful termination of the contract by the defendant worked a benefit to the plaintiff and that in such cases the special rule is that plaintiff should be confined to the contract in seeking a recovery. It is believed that this special qualification is peculiar to Ohio. See also *Alie v. Nadeau*.

where separate actions lie for breaches on either side. 2. Covenants which are conditions, and dependent on each other, in which the performance of one depends on the prior performance of the other. 3. Covenants which are mutual conditions to be performed at the same time, as to which the party who would maintain an action must, in general, offer or tender performance.

I consider the plaintiff's covenant as clearly belonging to the second class. The defendant's covenant was absolute. The cases cited by the defendant's counsel relate to the third class.

The plaintiff must have judgment, with leave to the defendant to amend on payment of costs. Judgment for the plaintiff.⁴⁵

BRUSIE *v.* PECK BROS. & CO.

14 UNITED STATES APPEALS, 21.—1893.

Action at law to recover the amount of royalties alleged to be due for the manufacture of sprinklers. Judgment for defendant. Plaintiff brings error.

Plaintiff granted defendant the exclusive right to manufacture and sell a lawn sprinkler patented by plaintiff, the defendant agreeing to pay plaintiff a royalty of two dollars for each sprinkler, and not to sell them for less than fifteen dollars, except by joint agreement, and to manufacture sprinklers for plaintiff at a profit of twenty-five per cent on the cost, which plaintiff might sell in competition with defendant. Differences arising between the parties, plaintiff forbade defendant to manufacture the sprinklers and himself began to manufacture and sell them.

The court charged that if the plaintiff, without any justification arising from the previous conduct of the defendant, entered upon the market as a competitor with it in making and selling the sprinklers, he was not entitled to recover, and submitted to the jury whether plaintiff violated the contract without justification arising from defendant's non-performance.

SHIPMAN, CIRCUIT JUDGE. This part of the case depends upon the question whether the respective undertakings of the two par-

⁴⁵ See *Dodge v. McClintock*, 47 N. H. 383; *Clough v. Baker*, 48 N. H. 254; *Loud v. Pomona Land and Water Co.*, 153 U. S. 564; *Gould v. Brown*, 6 Ohio St. 538.

ties to the contract shall be construed to be independent, so that a breach by one party is not an excuse for a breach by the other, and either party may recover damages for the injury he has sustained, or are dependent so that a breach by one relieves the other from the duty of performance. *Kingston v. Preston*, Doug. 689. "Where the agreements go to the whole of the consideration on both sides, the promises are dependent, and one of them is a condition precedent to the other. If the agreements go to a part only of the consideration on both sides, and a breach may be paid for in damages, the promises are so far independent." 2 Parsons on Contracts (8th ed.), 792. By the contract which is the foundation of this suit Brusie granted to the defendant the sole and exclusive right to manufacture the patented sprinkler, and the sole right to sell, except that Brusie could sell sprinklers manufactured by the defendant, paying it twenty-five per cent profit upon the cost of such manufacture. The defendant promised to manufacture sprinklers of good material, to use its best endeavors to introduce the same, to pay a royalty of two dollars upon each machine sold, and not to sell below fifteen dollars, unless the price was changed by joint agreement. Brusie having manufactured and sold at reduced prices, calls upon the defendant to pay a royalty of two dollars upon every machine which it sold, and to recover damages for his own violation of the contract in a separate action.

The contention of the plaintiff would have weight, if Brusie's fulfillment of his part of the contract had not been vital to the ability of the defendant to fulfill any part of its contract. The plaintiff bound the defendant not to sell at a price less than fifteen dollars, unless the price should be changed by joint agreement. He thereby impliedly promised that the price imposed upon the defendant should be maintained, unless altered by joint consent. The defendant's ability to pay the royalty depended upon Brusie's abstinence from competition at reduced prices. He could not become, as he did, the defendants' active competitor, lower prices without consent, and still compel the defendant to sell at not less than fifteen dollars, and pay a royalty of two dollars per machine. This breach by Brusie of his undertakings, when found to be unjustifiable by reason of any previous conduct of the defendant, relieved it from the obligation which it had assumed. There was no error in the charge, and the judgment of the Circuit Court is

Affirmed.

Divisible promises.**NORRINGTON v. WRIGHT *et al.***

115 UNITED STATES, 188.—1885.

Action of assumpsit. Judgment for defendants. Plaintiff brings error.

The action was on the following contract:

“Philadelphia, January 19, 1880. Sold to Messrs. Peter Wright & Sons, for account of A. Norrington & Co., London: Five thousand (5000) tons old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1st, 1880, at forty-five dollars (\$45.00) per ton of 2240 lbs. custom-house weight, ex ship Philadelphia. Settlement cash on presentation of bills accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments with vessels' names as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia.

“EDWARD J. ETTING, Metal Broker.”

Plaintiff shipped under this contract 400 tons by one vessel in the last part of February, 885 tons by two vessels in March, 1571 tons by five vessels in April, 850 tons by three vessels in May, 1000 tons by two vessels in June, and 300 tons by one vessel in July, and notified defendants of each shipment.

Defendants received and paid for the February shipment upon its arrival in March, but on May 14, about the time of the arrival of the March shipment, having learned of the amounts shipped in February, March, and April, gave written notice that they should decline to receive the shipments made in March and April because they were not in accordance with the contract. On June 10, plaintiff offered defendants a delivery of exactly 1000 tons, which was declined.

At the trial, the plaintiff contended, 1st. That under the contract he had six months in which to ship the 5000 tons, and any deficiency in the earlier months could be made up subsequently, provided that the defendants could not be required to take more than 1000 tons in any one month. 2d. That, if this was not so, the contract was a divisible contract, and the remedy of the defendants for a default in any month was not by rescission of the whole contract, but only by deduction of the damages caused by the delays in the shipments on the part of the plaintiff.

But the court instructed the jury that if the defendants, at the time of accepting the delivery of the cargo paid for, had no notice of the failure of the plaintiff to ship about 1000 tons in the month of February, and immediately upon learning that fact gave notice of their intention to rescind, the verdict should be for them.

The plaintiff excepted to this instruction, and, after verdict and judgment for the defendants, sued out this writ of error.

MR. JUSTICE GRAY. In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. *Behn v. Burness*, 3 B. & S. 751; *Bowes v. Shand*, 2 App. Cas. 455; *Lowber v. Bangs*, 2 Wall. 728; *Davison v. Von Lingen*, 113 U. S. 40.

The contract sued on is a single contract for the sale and purchase of 5000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron. *Mersey Co. v. Naylor*, 9 App. Cas. 434, 439. The further provision, that the sellers shall not be compelled to replace any parcel lost after shipment, simply reduces, in the event of such a loss, the quantity to be delivered and paid for.

The times of shipment, as designated in the contract, are "at the rate of about 1000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880." These words are not satisfied by shipping one-sixth part of the 5000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods,

identified by independent circumstances, such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill—in which case the mention of the quantity, accompanied by the qualification of “about,” or “more or less,” is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: “When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words ‘about,’ ‘more or less,’ and the like, in such cases, is only for the purpose of providing against accidental variations, arising from slight and unimportant excesses or deficiencies in number, measure, or weight.” *Brawley v. United States*, 96 U. S. 168, 171, 172.

The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract, that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff, instead of shipping about 1000 tons in February and about 1000 tons in March, as stipulated in the contract, shipped only 400 tons in February and 885 tons in March. His failure to fulfill the contract on his part in respect to these first two instalments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice, or means of knowledge, that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants

to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of *Lyon v. Bertram* (20 How. 149), in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract.

The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

For these reasons, we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases, and as a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated, it is proper to add that upon a careful examination of the cases referred to they do not appear to us to establish any rule inconsistent with our conclusion.

In the leading case of *Hoare v. Rennie* (5 H. & N. 19), which was an action upon a contract of sale of 667 tons of bar iron, to be shipped from Sweden in June, July, August and September, and in about equal portions each month, at a certain price payable on delivery, the declaration alleged that the plaintiffs performed all things necessary to entitle them to have the contract performed by the defendants, and were ready and willing to perform the contract on their part, and in June shipped a certain portion of the iron, and within a reasonable time afterwards offered to deliver to the defendants the portion so shipped, but the defendants refused to receive it, and gave notice to the plaintiffs that they would not accept the rest. The defendants pleaded that the shipment in June was of about 20 tons only, and that the plaintiffs failed to complete the shipment for that month according to the contract. Upon demurrer to the pleas, it was argued for the plaintiffs that the shipment of about one-fourth of the iron in each month was not a condition precedent, and that the defendants' only remedy for a failure to ship that quantity was by a cross action. But judgment was given for the defendants, Chief Baron Pollock saying:

"The defendants refused to accept the first shipment, because, as they say, it was not a performance, but a breach of the contract. Where parties

have made an agreement for themselves, the courts ought not to make another for them. Here they say that in the events that have happened one-fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset, the plaintiffs failed to tender the quantity according to the contract; they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action." 5 H. & N. 28.

So in *Coddington v. Paleologo* (L. R. 2 Ex. 193), while there was a division of opinion upon the question whether a contract to supply goods "delivering on April 17, complete 8th May," bound the seller to begin delivering on April 17, all the judges agreed that if it did, and the seller made no delivery on that day, the buyer might rescind the contract.

On the other hand, in *Simpson v. Crippin* (L. R. 8 Q. B. 14), under a contract to supply from 6000 to 8000 tons of coal, to be taken by the buyer's wagons from the seller's colliery in equal monthly quantities for twelve months, the buyer sent wagons for only 150 tons during the first month; and it was held that this did not entitle the seller to annul the contract and decline to deliver any more coal, but that his only remedy was by an action for damages. And in *Brandt v. Lawrence* (1 Q. B. D. 344), in which the contract was for the purchase of 4500 quarters, ten per cent more or less, of Russian oats, "shipment by steamer or steamers during February," or, in case of ice preventing shipment, then immediately upon the opening of navigation, and 1139 quarters were shipped by one steamer in time, and 3361 quarters were shipped too late, it was held that the buyer was bound to accept the 1139 quarters, and was liable to an action by the seller for refusing to accept them.

Such being the condition of the law of England as declared in the lower courts, the case of *Bowes v. Shand*, after conflicting decisions in the Queen's Bench Division and the Court of Appeal, was finally determined by the House of Lords. 1 Q. B. D. 470; 2 Q. B. D. 112; 2 App. Cas. 455.

In that case, two contracts were made in London, each for the sale of 300 tons of "Madras rice, to be shipped at Madras or coast, for this port, during the months of March (and or) April, 1874, per Rajah of Cochin." The 600 tons filled 8200 bags, of which 7120 bags were put on board and bills of lading signed in February; and for the rest, consisting of 1030 bags put on board in

February, and 50 in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence was given that rice shipped in February would be the spring crop, and quite as good as rice shipped in March or April. Yet the House of Lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April, or in one of those months.

In the opinions there delivered the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

Lord Chancellor Cairns said:

"It does not appear to me to be a question for your Lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance." 2 App. Cas. 463. "If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace, that literal meaning, to say that it puts an additional burden on the seller, without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The nonfulfillment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled." pp. 465, 466. "It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the months in question. My Lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, that is part of the description of the subject matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months." "The plaintiff, who sues upon that contract, has not

launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the nonfulfillment of the contract." pp. 467, 468.

Lord Blackburn said:

"If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the *Rajah* of Cochin. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship; and before the defendants can be compelled to take anything in fulfillment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for—otherwise they are not bound to take it." 2 App. Cas. 480, 481.

Soon after that decision of the House of Lords, two cases were determined in the Court of Appeal. In *Reuter v. Sala* (4 C. P. D. 239), under a contract for the sale of "about twenty-five tons (more or less) black pepper, October (and or) November shipment, from Penang to London, the name of the vessel or vessels, marks and full particulars to be declared to the buyer in writing within sixty days from date of bill of lading," the seller, within the sixty days, declared twenty-five tons by a particular vessel, of which only twenty tons were shipped in November, and five tons in December; and it was held that the buyer had the right to refuse to receive any part of the pepper. In *Honck v. Muller* (7 Q. B. D. 92), under a contract for the sale of 2000 tons of pig iron, to be delivered to the buyer free on board at the maker's wharf "in November, or equally over November, December, and January next," the buyer failed to take any iron in November, but demanded delivery of one-third in December and one-third in January; and it was held that the seller was justified in refusing to deliver, and in giving notice to the buyer that he considered the contract as canceled by the buyer's not taking any iron in November.

The plaintiff in the case at bar greatly relied on the very recent decision of the House of Lords in *Mersey Co. v. Naylor* (9 App.

Cas. 434), affirming the judgment of the Court of Appeal in 9 Q. B. D. 648, and following the decision of the Court of Common Pleas in *Freeth v. Burr*, L. R. 9 C. P. 208.

But the point there decided was that the failure of the buyer to pay for the first instalment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract and to decline to make further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor Selborne in moving judgment in the House of Lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first instalment.

The Lord Chancellor said:

“The contract is for the purchase of 5000 tons of steel blooms of the company’s manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract, as to the time of delivery, ‘Delivery 1000 tons monthly commencing January next;’ and as to the time of payment, ‘Payment net cash within three days after receipt of shipping documents;’ but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfillment of the unfulfilled part of the contract, by the delivery of the undelivered steel.” 9 App. Cas. 439.

Moreover, although in the Court of Appeal *dicta* were uttered tending to approve the decision in *Simpson v. Crippin*, and to disparage the decisions in *Hoare v. Rennie* and *Honck v. Muller*, above cited, yet in the House of Lords *Simpson v. Crippin* was not even referred to, and Lord Blackburn, who had given the leading opinion in that case, as well as Lord Bramwell, who had delivered the leading opinion in *Honck v. Muller*, distinguished *Hoare v. Rennie* and *Honck v. Muller* from the case in judgment. 9 App. Cas. 444,446.

Upon a review of the English decisions, the rule laid down in the earlier cases of *Hoare v. Rennie* and *Coddington v. Paleologo*, as well as in the later cases of *Reuter v. Sala* and *Honck v. Muller*,

appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of *Simpson v. Crippin* and *Brandt v. Lawrence*, and to accord better with the general principles affirmed by the House of Lords in *Bowes v. Shand*, while it in nowise contravenes the decision of that tribunal in *Mersey Co. v. Naylor*.

In this country there is less judicial authority upon the question. The two cases most nearly in point that have come to our notice are *Hill v. Blake* (97 N. Y. 216), which accords with *Bowes v. Shand*, and *King Philip Mills v. Slater* (12 R. I. 82), which approves and follows *Hoare v. Rennie*. The recent cases in the Supreme Court of Pennsylvania, cited at the bar, support no other conclusion. In *Shinn v. Bodine* (60 Penn. St. 182) the point decided was that a contract for the purchase of 800 tons of coal at a certain price per ton, "coal to be delivered on board vessels as sent for during months of August and September," was an entire contract, under which nothing was payable until delivery of the whole, and therefore the seller had no right to rescind the contract upon a refusal to pay for one cargo before that time. In *Morgan v. McKee* (77 Penn. St. 228) and in *Scott v. Kittanning Coal Co.* (89 Penn. St. 231) the buyer's right to rescind the whole contract upon the failure of the seller to deliver one instalment was denied, only because that right had been waived, in the one case by unreasonable delay in asserting it, and in the other by having accepted, paid for, and used a previous instalment of the goods. The decision of the Supreme Judicial Court of Massachusetts in *Winchester v. Newton* (2 Allen, 492) resembles that of the House of Lords in *Mersey Co. v. Naylor*.

Being of opinion that the plaintiff's failure to make such shipments in February and March as the contract required prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because the defendants could not be compelled to take about 1000 tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See *Busk v. Spence*, 4 Camp. 329; *Graves v. Legg*, 9 Exch. 709; *Reuter v. Sala*, above cited.

Judgment affirmed.

The Chief Justice was not present at the argument, and took no part in the decision of this case.

Conditions or principal promises.POPE *et al.* v. ALLIS.

115 UNITED STATES, 363.—1885.

Action to recover back money paid for iron which, on arrival, was rejected. Judgment for plaintiff (defendant in error).

Plaintiff bought of defendants by description a quantity of "No. 1 extra pig iron" to be shipped from Coplay, Penn. On arrival plaintiff rejected the iron because it did not answer the description.

MR. JUSTICE WOOD. The assignment of error mainly relied on by the plaintiffs in error is that the court refused to instruct the jury to return a verdict for the defendants. The legal proposition upon which their counsel based this request was that the purchaser of personal property, upon breach of warranty of quality, cannot, in the absence of fraud, rescind the contract of purchase and sale, and sue for the recovery of the price. And they contended that, as the iron was delivered to defendant in error either at Coplay or Elizabethport, and the sale was completed thereby, the only remedy of the defendant in error was by a suit upon the warranty. It did not appear that at the date of the contract the iron had been manufactured, and it was shown by the record that no particular iron was segregated and appropriated to the contract by the plaintiffs in error until a short time before its shipment, in the latter part of April and the early part of May. The defendant in error had no opportunity to inspect it until it arrived in Milwaukee, and consequently never accepted the particular iron appropriated to fill the contract. It was established by the verdict of the jury that the iron shipped was not of the quality required by the contract. Under these circumstances the contention of the plaintiffs in error is that the defendant in error, although the iron shipped to him was not what he bought, and could not be used in his business, was bound to keep it, and could only recover the difference in value between the iron for which he contracted and the iron which was delivered to him.

We do not think that such is the law. When the subject matter of a sale is not in existence, or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the

vendee under the contract; because the existence of those qualities being part of the description of the thing sold becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted. *Chanter v. Hopkins*, 4 Mees. & W. 399; *Barr v. Gibson*, 3 Mees. & W. 390; *Gompertz v. Bartlett*, 2 El. & Bl. 849; *Okell v. Smith*, 1 Stark, N. P. 107; notes to *Cutler v. Powell*, 2 Smith's Lead. Cas. (7th Am. ed.) 37; *Woodle v. Whitney*, 23 Wis. 55; *Boothby v. Scales*, 27 Wis. 626; *Fairfield v. Madison Manuf'g Co.*, 38 Wis. 346; See also *Nichol v. Godts*, 10 Exch. 191. So, in a recent case decided by this court, it was said by Mr. Justice Gray: "A statement" in a mercantile contract "descriptive of the subject matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract." *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. Rep. 12. See also *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. Rep. 19. And so, when a contract for the sale of goods is made by sample, it amounts to an undertaking on the part of the seller with the buyer that all the goods are similar, both in nature and quality, to those exhibited, and if they do not correspond the buyer may refuse to receive them; or, if received, he may return them in a reasonable time allowed for examination, and thus rescind the contract. *Lorymer v. Smith*, 1 Barn. & C. 1; *Magee v. Billingsley*, 3 Ala. 679.

The authorities cited sustain this proposition: that when a vendor sells goods of a specified quality, but not in existence or ascertained, and undertakes to ship them to a distant buyer, when made or ascertained, and delivers them to the carrier for the purchaser, the latter is not bound to accept them without examination. The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject them if they are not of the quality required by the contract. The rulings of the Circuit Court were in accordance with these views.

We have been referred by the plaintiffs in error to the cases of *Thornton v. Wynn* (12 Wheat. 184) and *Lyon v. Bertram* (20 How. 149) to sustain the proposition that the defendant in error in this case could not rescind the contract and sue to recover back

the price of the iron. But the cases are not in point. In the first, there was an absolute sale with warranty and delivery to the vendee of a specific chattel, namely, a race-horse; in the second, the sale was of a specified and designated lot of flour which the vendee had accepted, and part of which he had used, with ample means to ascertain whether or not it conformed to the contract.

The cases we have cited are conclusive against the contention of the plaintiffs in error. The jury has found that the iron was not of the quality which the contract required, and on that ground the defendant in error, at the first opportunity, rejected it, as he had a right to do. His suit to recover the price was, therefore, well brought.

Other errors are assigned, but, in our opinion, they present no ground for the reversal of the judgment, and do not require discussion.

Judgment affirmed.

COPLAY IRON CO. *v.* POPE *et al.*

108 NEW YORK, 232.—1888.

Action to recover the price of iron.

Defense, breach of warranty. Verdict directed for plaintiff. Defendants appeal.

Plaintiff sold defendants by description "No. 1 extra foundry pig iron." Defendants resold it by description to Allis & Co., to whom, by defendants' directions, it was shipped by plaintiff. Allis & Co. refused to accept it because it was inferior to the description. Defendants notified plaintiff that they should hold plaintiff liable for all damage sustained by the failure to deliver iron according to contract.

EARL, J. Treating this then as an executory contract of sale, the defendants are not in a position to complain of the quality of the iron, because they never offered to return it, and never gave the plaintiff notice or opportunity to take it back. They must therefore be conclusively presumed to have acquiesced in the quality of the iron. *Hargous v. Stone*, 5 N. Y. 73; *Reed v. Randall*, 29 Id. 358; *McCormick v. Sarson*, 45 Id. 265; *Dutchess Co. v. Harding*, 49 Id. 323; *Gaylord Mfg. Co. v. Allen*, 53 Id. 515. Here there was no collateral warranty or agreement as to the quality of the iron.

The representation as to the kind and quality of iron was part of the contract of sale itself, descriptive simply of the article to be delivered in the future; and clearly within the cases cited, an acceptance of the property by the defendants, without any offer to return the same at any time, deprives them of any right to make complaint of its inferior quality.

The judgment should be affirmed with costs. All concur except Andrews, J., not voting.

Judgment affirmed.

WOLCOTT *et al.* v. MOUNT.

36 NEW JERSEY LAW, 262.—1873.

Action for breach of warranty. Judgment for plaintiff. Defendants appeal.

Plaintiff purchased of defendants, who were retail merchants, a quantity of seed represented and believed by defendants to be early strap-leaf red-top turnip seed, plaintiff informing defendants that he wanted seed of that variety to raise a crop for the early New York market. In fact the seed was of a late variety, fit only for cattle, and plaintiff lost his entire crop. The difference between the two kinds of seed cannot be discovered by inspection.

DEPUE, J. The action in this case was brought on a contract of warranty and resulted in a judgment against the defendants in the action for damages.

Two exceptions to the proceedings are presented by the brief submitted. The first touches the right of the plaintiff to recover at all. The second, the measure of damages.

I.

In the absence of fraud or a warranty of the quality of an article, the maxim, *caveat emptor*, applies. As a general rule, no warranty of the goodness of an article will be implied on a contract of sale.

It has been held by the courts of New York, that no warranty whatever would arise from a description of the article sold. *Seiras v. Woods*, 2 Caines, 48; *Snell v. Moses*, 1 Johns. 96; *Swett v. Colgate*, 20 Johns. 196. In these cases the defect was not in the qual-

ity, but the article delivered was not of the species described in the contract of sale.

In the well-known case of *Chandelor v. Lopus* (Cro. Jac. 4) it was decided that a bare affirmation that a stone sold was a bezoar stone, when it was not, was no cause for action.

The cases cited fairly present the negative of the proposition on which the plaintiff's right of action depends. *Chandelor v. Lopus* was decided on the distinction between actions on the case *in tort* for a misrepresentation, in which a scienter must be averred and proved and actions upon the contract of warranty. 1 Smith's Lead. Cas. 283. Chancellor Kent, who delivered the opinion in *Seixas v. Woods*, in his Commentaries, expresses a doubt whether the maxim, *caveat emptor*, was correctly applied in that case, inasmuch as there was a description in writing of the articles sold, from which a warranty might have been inferred. 2 Kent, 479. And in a recent case before the Commission of Appeals of New York, Earl, C., declared that *Seixas v. Woods* had been much questioned and could no longer be regarded as authority on the precise point. *Hawkins v. Pemberton*, 51 N. Y. 204. In the later English cases some criticism has been made upon the application of the term "warranty" to representations in contracts of sale, descriptive of articles which are known in the market by such descriptions, per Lord Abinger in *Chanter v. Hopkins*, 4 M. & W. 404; per Erle, C. J., in *Bannerman v. White*, 10 C. B. (N. S.) 844. But in a number of instances it has been held that statements descriptive of the subject matter, if intended as a substantive part of the contract, will be regarded in the first instance as conditions, on the failure of which the other party may repudiate *in toto*, by a refusal to accept or a return of the article, if that be practicable, or if part of the consideration has been received, and rescission therefore has become impossible, such representations change their character as conditions and become warranties, for the breach of which an action will lie to recover damages. The rule of law is thus stated by Williams, J., in *Behn v. Burness*, as established on principle and sustained by authority. 3 B. & S. 755.

In *Bridge v. Wain* (1 Starkie, 504) no special warranty was proved, but the goods were described as scarlet cuttings, an article known in the market as peculiar to the China trade. In an action for breach of warranty, Lord Ellenborough held that if the goods were sold by the name of scarlet cuttings, and were so described in the invoice, an undertaking that they were such must be in-

ferred. In *Allan v. Lake* (18 Q. B. 560) the defendant sold to the plaintiff a crop of turnips, described in the note sold as Skirving's Sweedes. The seed having been sown, it turned out that the greater part was not of that kind, but of an inferior kind. It was held that the statement that the seeds were Skirving's Sweedes, was a description of a known article of trade and a warranty. In *Josling v. Kingsford* (13. C. B. N. S. 447) the purchaser recovered damages upon a contract for the sale of oxalic acid, where the jury found that the article delivered did not, in a commercial sense, come properly within the description of oxalic acid, though the vendor was not the manufacturer, and the vendee had an opportunity of inspection (the defect not being discoverable by inspection), and no fraud was suggested. In *Wieler v. Schilizzi* (17 C. B. 619) the sale was of "Calcutta linseed." The goods had been delivered, and the action was in form on a warranty implied from the description. The jury having found that the article delivered had lost its distinctive character as Calcutta linseed, by reason of the admixture of foreign substance, the plaintiff recovered his damages upon the warranty.

The doctrine that on the sale of a chattel as being of a particular kind or description, a contract is implied that the article sold is of that kind or description, is also sustained by the following English cases: *Powell v. Horton*, 2 Bing. N. C. 668; *Barr v. Gibson*, 3 M. & W. 390; *Chanter v. Hopkins*, 4 M. & W. 399; *Nichol v. Godts*, 10 Exch. 191; *Gompertz v. Bartlett*, 2 E. & B. 849; *Azemar v. Casella*, Law Rep. 2 C. P. 431, 677; and has been approved by some decisions in the courts of this country. *Henshaw v. Robins*, 9 Metc. 83; *Borrekins v. Bevan*, 3 Rawle, 23; *Osgood v. Lewis*, 2 Harr. & Gill. 495; *Hawkins v. Pemberton*, 51 N. Y. 198.

The right to repudiate the purchase for the non-conformity of the article delivered, to the description under which it was sold, is universally conceded. That right is founded on the engagement of the vendor, by such description, that the article delivered shall correspond with the description. The obligation rests upon the contract. Substantially, the description is warranted. It will comport with sound legal principles to treat such engagements as conditions in order to afford the purchaser a more enlarged remedy, by rescission, than he would have on a simple warranty; but when his situation has been changed, and the remedy, by repudiation, has become impossible, no reason supported by principle can

be adduced, why he should not have upon his contract such redress as is practicable under the circumstances. In that situation of affairs, the only available means of redress is by an action for damages. Whether the action shall be technically considered an action on a warranty, or an action for the non-performance of a contract, is entirely immaterial.

The contract which arises from the description of an article on a sale by a dealer not being the manufacturer is not in all respects coextensive with that which is sometimes implied where the vendor is the manufacturer, and the goods are ordered by a particular description, or for a specified purpose, without opportunity for inspection, in which case a warranty, under some circumstances, is implied that the goods shall be merchantable, or reasonably fit for the purpose for which they were ordered. In general, the only contract which arises on the sale of an article by a description, by its known designation in the market, is that it is of the kind specified. If the article corresponds with that description, no warranty is implied that it shall answer the particular purpose in view of which the purchase was made. *Chanter v. Hopkins*, 4 M. & W. 404; *Ollivant v. Boyley*, 5 Q. B. 288; *Winsor v. Lombard*, 18 Pick. 57; *Mixer v. Coburn*, 11 Metc. 559; *Gossler v. Eagle &c. Co.*, 103 Mass. 331. The cases on this subject, so productive of judicial discussion, are classified by Justice Mellor, in *Jones v. Just*, Law Rep. 3 Q. B. 197. Nor can any distinction be maintained between statements of this character in written and in oral contracts. The arguments founded on an apprehension that where the contract is oral, loose expressions of judgment or opinion pending the negotiations might be regarded as embodied in the contract, contrary to the intentions of the parties, is without reasonable foundation. It is always a question of construction or of fact, whether such statements were the expression of a mere matter of opinion, or were intended to be a substantive part of the contract, when concluded. If the contract is in writing, the question is one of construction for the court. *Behn v. Burness*, 3 B. & S. 751. If it be concluded by parol, it will be for the determination of the jury, from the nature of the sale, and the circumstances of each particular case, whether the language used was an expression of opinion, merely leaving the buyer to exercise his own judgment, or whether it was intended and understood to be an undertaking which was a contract on the part of the seller. *Lomi v. Tucker*, 4 C. & P. 15; *De Sewhanberg v. Buchanan*, 5 C. & P. 343; *Power v. Barham*, 4 A. & E. 473. In

the case last cited, the vendor sold by a bill on parcels, "four pictures, views in Venice—Canaletto;" it was held that it was for the jury to say, under all the circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description or an expression of opinion, and that the bill of parcels was properly laid before the jury with the rest of the evidence.

The purchaser may contract for a specific article, as well as for a particular quality, and if the seller makes such a contract, he is bound by it. The state of the case presented shows that the plaintiff inquired for seed of a designated kind, and informed the defendants that he wanted it to raise a crop for the New York market. The defendants showed him the seed, and told him it was the kind he inquired for, and sold it to him as such. The inspection and examination of the seed were of no service to the plaintiff. The facts and circumstances attending the transaction were before the court below, and from the evidence, it decided that the proof was sufficient to establish a contract of warranty. The evidence tended to support that conclusion, and this court cannot, on *certiorari*, review the finding of the court below, on a question of fact, where there is evidence from which the conclusion arrived at may be lawfully inferred.⁴⁶

II.

The second reason for reversal is, that the court was in error in the damages awarded. The judgment was for consequential damages.

The contention of the defendants' counsel was that the damages recoverable should have been limited to the price paid for the seed, and that all damages beyond a restitution of the consideration were too speculative and remote to come within the rules for measuring damages. As the market price of the seed which the plaintiff got, and had the benefit of in a crop, though of an inferior quality, was probably the same as the market price of the seed ordered, the defendants' rule of damages would leave the plaintiff remediless.

The earlier cases, both in English and American courts, generally concurred in excluding, as well in actions in tort as in actions on contracts, from the damages recoverable, profits which might

⁴⁶ Accord: *Bagley v. Cleveland Rolling Mill Co.*, 22 Blatch. 342; S. C. 21 Fed. Rep. 159.

have been realized if the injury had not been done, or the contract had been performed. Sedg. on Dam. 69.

This abridgment of the power of courts to award compensation adequate to the injury suffered has been removed in actions of tort. The wrong-doer must answer in damages for those results injurious to other parties, which are presumed to have been within his contemplation when the wrong was done. *Crater v. Binninger*, 4 Vroom, 513. Thus, in an action to recover damages for personal injuries caused by the negligence of the defendant, the plaintiff was held to be entitled to recover as damages the loss he sustained in his profession as an architect, by reason of his being incapacitated from pursuing his business. *New Jersey Express Co. v. Nichols*, 4 Vroom, 435.

A similar relaxation of this restrictive rule has been made, at least to a qualified extent, in action on contracts, and loss of profits resulting naturally from the breach of the contract, has been allowed to enter into the damages recoverable where the profits that might have been realized from the performance of the contract are capable of being estimated with a reasonable degree of certainty. In an action on a warranty of goods adapted to the China market, and purchased with a view to that trade, the purchaser was allowed damages with reference to their value in China, as representing the benefit he would have received from the contract, if the defendant had performed it. *Bridge v. Wain*, 1 Starkie, 504. On an executory contract put an end to by the refusal of the one party to complete it, for such a breach the other party may recover such profits as would have accrued to him as the direct and immediate result of the performance of the contract. *Fox v. Harding*, 7 Cush. 516; *Masterton v. Mayor of Brooklyn*, 7 Hill, 61. In an action against the charterer of a vessel for not loading a cargo, the freight she would have earned under the charter party, less expenses and the freight actually received for services during the period over which the charter extended, was held to be the proper measure of damages. *Smith v. McGuire*, 3 H. & N. 554.

In the cases of the class from which these citations have been made, and they are quite numerous, the damages arising from loss of profits were such as resulted directly from the non-performance, and in the ordinary course of business would be expected as a necessary consequence of the breach of the contract. In the two cases cited, of *Fox v. Harding* and *Masterton v. Mayor of Brooklyn*, it was said that the profits that might have been realized from inde-

pendent and collateral engagements, entered into on the faith of the principal contract, were too remote to be taken into consideration. This latter qualification would exclude compensation for the loss of the profits of a resale by the vendee of the goods purchased, made upon the faith of his expectation, that his contract with his vendor would be performed.

In the much canvassed case of *Hadley v. Baxendale* (9 Exch. 341), Alderson, B., in pronouncing the judgment of the court, enunciated certain principles on which damages should be awarded for breaches of contracts which assimilated damages in actions on contract to actions in tort. The rule there adopted as resting on the foundation of correct legal principles was, that the damages recoverable for a breach of contract were either such as might be considered as arising naturally, *i. e.* according to the usual course of things, from the breach of the contract itself; or such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable results of the breach of it; and that when the contract is made under special circumstances, if those special circumstances are communicated, the amount of injury which would ordinarily follow from a breach of the contract, under such circumstances, may be recovered as damages that would reasonably be expected to result from such breach. The latter branch of this rule was considered by Blackburn, J., and Martin, B., as analogous to an agreement to bear the loss resulting from the exceptional state of things, made part of the principal contract, by the fact that such special circumstances were communicated, with reference to which the parties may be said to have contracted. *Horne v. The Midland Railway Company*, Law Rep. 8 C. P. 134-140. Under the operation of this rule, damages arising from the loss of a profitable sale, or the deprivation for a contemplated use, have been allowed when special circumstances of such sale or proposed use were communicated contemporaneously with the making of the contract; and have been denied when such communication was not made so specially, as that the other party was made aware of the consequences that would follow from his non-performance. *Borries v. Hutchinson*, 18 C. B. (N. S.) 445; *Cory v. Thames Ironworkers Co.*, Law Rep. 3 Q. B. 181; *Horne v. The Midland Railway Company*, L. R. 8 C. P. 134; Benjamin on Sales, 665-671.

It must not be supposed that under the principle of *Hadley v. Baxendale* mere speculative profits, such as might be conjectured

to have been the probable results of an adventure which was defeated by the breach of the contract sued on, the gains from which are entirely conjectural, with respect to which no means exist of ascertaining, even approximately, the probable results, can, under any circumstances, be brought within the range of damages recoverable. The cardinal principle in relation to the damages to be compensated for on the breach of a contract, that the plaintiff must establish the quantum of his loss, by evidence from which the jury will be able to estimate the extent of his injury, will exclude all such elements of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty.

For instance, profits expected to be made from a whaling voyage, the gains from which depend in a great measure upon chance, are too purely conjectural to be capable of entering into compensation for the non-performance of a contract, by reason of which the adventure was defeated. For a similar reason, the loss of the value of a crop for which the seed had not been sown, the yield from which, if planted, would depend upon the contingencies of weather and season, would be excluded as incapable of estimation, with that degree of certainty which the law exacts in the proof of damages. But if the vessel is under charter, or engaged in a trade, the earnings of which can be ascertained by reference to the usual schedule of freights in the market, or if a crop has been sowed on the ground prepared for cultivation, and the plaintiff's complaint is, that because of the inferior quality of the seed a crop of less value is produced, by these circumstances the means would be furnished to enable the jury to make a proper estimation of the injury resulting from the loss of profits of this character.

In this case the defendants had express notice of the intended use of the seed. Indeed, the fact of the sale of seeds by a dealer keeping them for sale for gardening purposes, to a purchaser engaged in that business, would of itself imply knowledge of the use which was intended, sufficient to amount to notice. The ground was prepared and sowed, and a crop produced. The uncertainty of the quantity of the crop, dependent upon the condition of weather and season, was removed by the yield of the ground under the precise circumstances to which the seed ordered would have been exposed. The difference between the market value of the crop raised, and the same crop from the seed ordered, would be the correct criterion of the extent of the loss. Compensation on that basis may be recovered in damages for the injury sustained as the

natural consequence of the breach of the contract. *Randall v. Raper*, E. B. & E. 84; *Lovegrove v. Fisher*, 2 F. & F. 128.

From the state of the case, it must be presumed that the court below adopted this rule as the measure of damages, and the judgment should be affirmed.⁴⁷

Warranties or collateral promises.

FREYMAN *v.* KNECHT.

78 PENNSYLVANIA STATE, 141.—1875.

Action on the case. Verdict for plaintiff. Defendant brings error.

Defendant sold plaintiff a horse and warranted it sound. It turned out that the horse had one blind eye and the other was affected. Plaintiff took the horse to defendant's house and left it there, but defendant refused to receive it, and it was sold as an estray. The plaintiff was allowed to recover as damages the purchase price with interest.

MR. JUSTICE WILLIAMS. It was clearly competent for the plaintiff to prove that, when he purchased the mare in November, 1872, her eyes were diseased; and in order to show that the disease was not temporary but permanent and incurable, that it continued until November, 1873, when one of her eyes became wholly blind and the sight of the other was greatly impaired. But evidence as to the condition of her eyes in November, 1873, was not admissible *per se* for the purpose of showing that they were diseased at the time of the sale; and it should not have been received if there was no evidence tending to show what their condition was during the ten months immediately preceding that date. If the defendant was guilty of fraud in the sale and warranty of the mare, the plaintiff had the right to rescind the contract, and upon returning or offering to return her, to recover back the price paid in an action on the case for deceit, or in an action of assumpsit or case for the fraudulent warranty. 1 Chit. Pl. 137. But if there was no fraud or deceit in the sale, the plaintiff had no right to rescind the contract for the alleged breach of warranty, and to return the mare without the defendant's consent. *Kase v. John*, 10 Watts, 107;

⁴⁷ Affirmed 38 N. J. L. 496 (1875).

Sedgwick on Damages, 286-7. It is true that he might sue either in assumpsit or case for the breach of the warranty (*Vanleer v. Earle*, 2 Casey, 277); but the measure of his damages would be, not the consideration or price paid, but the difference between the actual value of the mare, and her value, if sound, with interest from the date of the sale. Where there is no fraud or agreement to return, the vendee cannot rescind the contract after it has been executed, but his only remedy is an action on the warranty.

In this case it is not alleged that the defendant was guilty of any fraud or deceit in the sale and warranty of the mare, nor is there any evidence that he knew or had any reason to believe that her eyes were permanently and incurably diseased at the time of the sale. The plaintiff, therefore, had no right to return the mare, and the defendant was not bound to take her back and refund the price. It follows that there was error in overruling the defendant's offer to show that he refused to accept the mare when she was returned by the plaintiff, and that soon afterwards she was sold as a stray for about the same price the plaintiff paid for her; and for not charging, as requested in defendant's fourth point, that the horse, or the value thereof, is to be considered as the property of the plaintiff. The defendant had the right to show the price for which the mare was sold, as a stray, by the constable, as evidence of her value at the time of the sale to the plaintiff; and he was entitled to the instruction prayed for, in order to limit the plaintiff's recovery to the difference between the actual value of the mare, and her value, if sound, as warranted, with interest thereon from the date of her sale. The other assignments of error are not sustained, but for the reasons given the judgment must be reversed.

Judgment reversed, and a *venire facias de novo* awarded.⁴⁸

BRYANT *v.* ISBURGH.

13 GRAY (MASS.), 607.—1859.

Action of contract to recover the price of a horse sold and delivered to the defendant by the plaintiff. Answer, that the plaintiff

⁴⁸ Accord: *Matteson v. Holt*, 45 Vt. 336; *Marsh v. Low*, 55 Ind. 271; *Thornton v. Wynn*, 12 Wheat. 189. In New York there is an unbroken line of *dicta* to the same effect. *Voorhees v. Earl*, 2 Hill, 288; *Cary v. Gruman*, 4 Hill, 625; *Muller v. Eno*, 14 N. Y. 597; *Day v. Pool*, 52 N. Y. 416; *Brigg v. Hilton*, 99 N. Y. 517.

warranted the horse to be sound at the time of the sale; that the horse proved to be unsound, and was returned to the plaintiff. The plaintiff did not receive the horse back, but declined to do so. Verdict for plaintiff, with deduction for damages.

The court charged that the defendant had no right to return the horse and rescind the contract, in the absence of fraud, unless such a remedy was provided for by the terms of the contract. Defendant excepted to this charge.

METCALF, J. The precise question in this case is, whether a purchaser of personal property, sold to him with an express warranty, and taken into possession by him, can rescind the contract and return the property, for breach of the warranty, when there is no fraud, and no express agreement that he may do so. It appears from the cases cited for the plaintiff that in the English courts, and in some of the courts in this country, he cannot, and that his only remedy is on the warranty. See also 2 Steph. N. P. 1296; Addison on Con. (2d Amer. ed.) 272; Oliphant's Law of Horses, 88; *Cripps v. Smith*, 3 Irish Law R. 277.

But we are of opinion (notwithstanding a *dictum* of Parsons, C. J., in *Kimball v. Cunningham*, 4 Mass. 505) that, by the law of this commonwealth, as understood and practiced upon for more than forty years, there is no such difference between the effect of an implied and an express warranty as deprives a purchaser of any legal right of rescission under the latter which he has under the former; and that he to whom property is sold with express warranty, as well as he to whom it is sold with an implied warranty, may rescind the contract for breach of warranty, by a seasonable return of the property, and thus entitle himself to a full defense to a suit brought against him for the price of the property, or to an action against the seller to recover back the price, if it has been paid to him. In *Bradford v. Manly* (13 Mass. 139), where it was decided that a sale by sample was tantamount to an express warranty that the sample was a true representative of the kind of thing sold (and in which case there was no fraud). Chief Justice Parker said: "If a different thing is delivered, he" (the seller) "does not perform his contract, and must pay the difference, or receive the thing back and rescind the bargain, if it is offered him." This, it is true, was only a *dictum*, and not to be regarded as a decisive authority. But in *Perley v. Balch* (23 Pick. 283), which was an action on a promissory note given for the price of an ox sold to the

defendant, it was adjudged that the jury were rightly instructed that if, on the sale of the ox, there was fraud, *or an express warranty and a breach of it*, the defendant might avoid the contract by returning the ox within a reasonable time, and that this would be a defense to the action. In *Dorr v. Fisher* (1 Cush. 274) it was said by Shaw, C. J., that, "to avoid circuitry of action, a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract and recover back the amount of his purchase money, as in case of fraud. But if he does this, he must first return the property sold, or do everything in his power requisite to a complete restoration of the property to the vendor; and without this he cannot recover." The chief justice took no distinction between an express warranty and an implied one, but referred, in support of what he had said (with other cases), to *Perley v. Balch*, cited above.

In 1816, when the case of *Bradford v. Manly* was before this court, and afterwards, until 1831, the law of England, on the point raised in the present case, was supposed to be as we now hold it to be here. Lord Eldon had said, in *Curtis v. Hannay* (3 Esp. R. 82), that he took it to be "clear law;" and so it was laid down in 2 Selw. N. P. (1st ed.) 586, in 1807, and in Long on Sales, 125, 126, in 1821, and in 2 Stark. Ev. (1st ed.) 645, in 1825. In 1831, in *Street v. Blay* (2 B. & Ad. 461), Lord Eldon's opinion was first denied, and a contrary opinion expressed by the court of the king's bench. Yet our court subsequently (in 1839) decided the case of *Perley v. Balch*. The doctrine of that decision prevents circuitry of action and multiplicity of suits, and at the same time accomplishes all the ends of justice.

Exceptions sustained.⁴⁹

⁴⁹ Accord: *Marston v. Knight*, 29 Me. 341; *Franklin v. Long*, 7 Gill. & Johns. (Md.) 407; *Rogers v. Hanson*, 35 Ia. 283; *Boothby v. Scales*, 27 Wis. 626; *Smith v. Hale*, 158 Mass. 178.

See also *Griffin v. Colver*, 16 N. Y. 489; *Allison v. Chandler*, 11 Mich. 542; *Sherman v. Kitsmiller*; *Windmuller v. Pope*; *Hale v. Trout*; *Davison v. Von Lingen*.

"It is not true that loss of profits cannot be allowed as damages for a breach of contract. Losses sustained and gains prevented are proper elements of damage. Most contracts are entered into with a view to future profits, and such profits are in the contemplation of the parties, and so far as they can be properly proved, they may form the measure of damage. As they are prospective, they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of

Remedy for breach: damages.**VALENTE v. WEINBERG.**

80 CONN. 134.—1907.

Action for services rendered and materials furnished under building contracts. From a judgment for plaintiff, defendant appeals.

THAYER, J. The plaintiff and defendant entered into two contracts for the erection of a brick apartment house by the former upon the land of the latter. The second contract provided merely for additions to and changes in the earlier one, and we may refer to them as one contract. The plaintiff claims that after he had nearly completed the building the defendant unlawfully ejected him from the premises and prevented his completion of the contract. He sues to recover the value of the labor and materials which he had furnished before he was ejected. The defendant admits that he ejected the plaintiff and terminated his employment under the contract, but claims to have done so pursuant to article 5 of the contract, and by his answer and counter-claim seeks to recover from the plaintiff the amount which the defendant has paid to another person to complete the building. If the plaintiff, without fault on his part, was prevented by the defendant from completing the contract, he could treat it as rescinded, and recover, on *quantum meruit*, for the work and labor performed under it, or he could bring his action for damages against the defendant for breaking the contract and preventing the plaintiff's performance of it. *Derby v. Johnson*, 21 Vt. 18, 21; *Wright v. Haskell*, 45 Me.

contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to the rules of damages, to determine the compensation to be awarded for the breach. When a contract is repudiated, the compensation of the party complaining of its repudiation should be the value of the contract. He has been deprived of his contract, and he should have in lieu thereof its value, to be ascertained by the application of rules of law which have been laid down for the guidance of courts and jurors."—Earl, J., in *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205, 209, 210; *Beeman v. Banta*, 118 N. Y. 538; *Swain v. Schieffelin*, 134 N. Y. 471; *United States v. Behan*, 110 U. S. 338; *Howard v. Mfg. Co.*, 139 U. S. 199.

492; *United States v. Behan*, 110 U. S. 338, 344, 4 Sup. Ct. 81, 28 L. Ed. 168; *Chicago v. Tilley*, 103 U. S. 146, 154, 26 L. Ed. 371; *Connelly v. Devoe*, 37 Conn. 570, 576. If, on the other hand, the plaintiff failed to perform his contract, and the defendant rightfully entered and completed it, acting under the terms of the contract, the plaintiff cannot recover. The case turns, therefore, upon the question whether the defendant rightfully entered and ejected the plaintiff. . . .

We think that, as already indicated, such a certificate in strict compliance with the terms of article 5 was essential, and that the defendant, in proceeding to eject the plaintiff and prevent his performance of his contract without such certificate, acted wrongfully. The plaintiff, therefore, is entitled to recover for the services and materials furnished in the construction of the building.

The court correctly overruled the defendant's claim that, if the plaintiff was entitled to recover, "the measure of damages is that adopted in *Pinches v. Church*, 55 Conn. 183, 10 Atl. 264, viz., the total which the plaintiff could have recovered, less what it cost to complete the building," deducting any payments which had been received by him. The case referred to and the present case are within well-recognized, but different, exceptions to the general rule that no recovery can be had for labor or materials furnished under a special contract unless the contract has been performed. The present case is within the exception which permits a recovery by the contractor when the other party has incapacitated himself to perform his part of the contract, or prevented the contractor from performing his. The failure to perform being due to the defendant, and without fault on the part of the plaintiff, it would be unjust that he should suffer because of the defendant's fault while the latter reaps the full benefit of the contract. The case of *Pinches v. Church* was within the exception which allows a recovery when the contractor has deviated slightly from the terms of the contract, not willfully, but in good faith, and the other party has availed himself of and been benefited by the labor and materials furnished. In such a case it is manifestly just that the latter should be allowed for any reasonable expense incurred in remedying the defect, or in making additions necessary to complete the work. In *Pinches v. Church*, it being impracticable, at a reasonable price, to complete the work according to the contract, the plaintiff was allowed the contract price less the diminution in value of the building by reason of the deviations. The difference

between that case and this is clear, and the reason for a different rule of damages is equally clear. Had the plaintiff in the present case, instead of treating the contract as rescinded, sought to recover damages for the defendant's breach of it, a different rule of damages, but not that contended for by the defendant, would have applied. *United States v. Behan, supra; Derby v. Johnson, supra.* But the allegations of the complaint are not adapted to such a cause of action, and it must be treated as an action to recover for services rendered and materials furnished.

The defendant alleges error on the part of the trial court in holding that he was not entitled to recover the items referred to in paragraph 13 of the finding. But all these items were in effect allowed him in the judgment, except the loan of \$462, which was not recoverable under the pleadings.

The remaining reasons of appeal need not be discussed, because their soundness depends upon the validity of the defendant's claims (already considered and decided adversely to his contention) that the action is upon the contract, and that the architects were *quasi* judges between the parties, and had given a certificate which warranted the defendant in terminating the plaintiff's employment.

Remedy for breach: specific performance.

ADAMS v. MESSINGER.

147 MASSACHUSETTS, 185.—1888.

Bill in equity for specific performance and for an injunction. Demurrer to bill. Demurrer sustained. Plaintiff appeals.

The bill alleged that the defendant agreed to furnish to plaintiff certain steam injectors, and further agreed that in case he took out in the United States patents for improvements in such injectors he would apply for patents in Canada, and on receiving the same assign them to plaintiff; that defendant had failed and refused to supply the injectors, and had, after taking out additional patents in the United States, failed and refused to apply for corresponding patents in Canada; that plaintiff could obtain the injectors only of defendant, and had suffered great and peculiar damages from defendant's failure to deliver them. The bill prayed that defend-

ant might be decreed specifically to perform the agreement; that there might be assessed damages growing out of defendant's neglect; and that defendant might be restrained from alienating his right to the patents in Canada.

The defendant demurred to the bill on the following grounds:

"1. That the plaintiff has not stated such a case as entitles him to any relief in equity against the defendant. 2. That the plaintiff has a plain and adequate remedy at law. 3. That the agreement, specific performance of which the plaintiff prays may be decreed, is a contract for personal services. 4. That the specific performance, which the plaintiff prays may be decreed, requires the exercise of mechanical skill, intellectual ability, and judgment. 5. That the specific performance of said agreement involves the building of a machine embodying a patent. 6. That the securing of letters patent in Canada involves the action of officers of a foreign government, and cannot be the subject of an order for specific performance. 7. That it does not appear by said bill what relief the plaintiff prays for, and the plaintiff's bill is entirely indefinite and uncertain."

DEVENS, J. It is the contention of the defendant, that the plaintiff has a full, complete, and adequate remedy at common law by an action for damages, and that the court sitting in equity cannot grant the relief sought by the prayer of the bill.

The controversy arises from the failure to perform an executory written contract. So far as this relates to personal property, the objections arising from the statute of frauds, which have sometimes been found to exist when oral contracts were sought to be enforced, have of course no application. The general rule that contracts as to the purchase of personal property are not specifically enforced, as are those which relate to real property, does not rest on the ground of any distinction between the two classes of property other than that which arises from their character.

Contracts which relate to real property can necessarily be satisfied only by a conveyance of the particular estate or parcel contracted for, while those which relate to personal property are often fully satisfied by damages which enable the party injured to obtain elsewhere in the market property precisely similar to that which he had agreed to purchase. The distinction between real and personal property is entirely subordinate to the question whether an adequate remedy can thus be afforded. If, from the nature of the personal property, it cannot, a court of equity will entertain jurisdiction to enforce the contract. Story Eq. Jur., § 717; *Clark v. Flint*, 22 Pick. 231. A contract for bank, railway, or other cor-

poration stock freely sold in the market, might not be thus enforced, but it would be otherwise where the stock was limited in amount, held in a few hands, and not ordinarily to be obtained. *White v. Schuyler*, 1 Abb. Pr. (N. S.) 300; *Treasurer v. Commercial Mining Co.*, 23 Cal. 390; *Poole v. Middleton*, 29 Beav. 646; *Doloret v. Rothschild*, 1 Sim. & Stu. 590. See *Chaffee v. Middlesex Railroad*, 146 Mass. 224.

Where articles of personal property are also peculiar and individual in their character, or have an especial value on account of the associations connected with them, as pictures, curiosities, family furniture, or heirlooms, specific performance of a contract in relation to them will be decreed. *Lloyd v. Loaring*, 6 Ves. 773; *Fells v. Read*, 3 Ves. Jr. 70; *Lowther v. Lowther*, 13 Ves. 95; *Williams v. Howard*, 3 Murphey, 74. An agreement to assign a patent will be specifically enforced. *Binney v. Annan*, 107 Mass. 94. Nor do we perceive any reason why an agreement to furnish articles which the vendor alone can supply, either because their manufacture is guarded by a patent or for any similar reason, should not also be thus enforced. *Hapgood v. Rosenstock*, 23 Fed. Rep. 86. As the value of a patent right cannot be ascertained by computation, so it is impossible with any approach to accuracy to ascertain how much a vendee would suffer from not being able to obtain such articles for use in his business.

The contract of the defendant was twofold, to furnish and deliver certain described working steam injectors within a specified time to the plaintiff, and also that, if the defendant shall make improvements in injectors for steam boilers, and shall take out patents therefor in the United States, he will apply for letters patent in Canada, and on obtaining them will assign and convey the same to the plaintiff, and that he will not do any act prejudicial to these letters patent of Canada or the monopoly thus secured.

It is said that the court will not enforce a contract for personal services when such services require the exercise of peculiar skill, intellectual ability, and judgment, and therefore that the defendant cannot be ordered to make and deliver the injectors contracted for. But the principle on which it is held that a court of equity cannot decree one to perform a personal service involving peculiar talent or skill, because it cannot so mold its order and so supervise the individual executing it that it can determine whether he has honestly obeyed it or not, has no application here.

The defendant has agreed to furnish and deliver certain injec-

tors, which the contract shows to be patented articles. It does not appear from the bill that they were yet to be made when the contract was executed. But if it be assumed that they were, there is nothing from which it can be inferred that any skill peculiar to the defendant was required to construct them. For aught that appears, they could be made by any intelligent artificer in the metals of which they are composed. The details of their manufacture are given by reference to the patents which are referred to in the agreement, so that no difficulty such as has sometimes been experienced could have been found in describing accurately, and even minutely, the articles to be furnished. Nor are there found in the case at bar any continuous duties to be done, or work to be performed, requiring any permanent supervision, which, as it could not be concluded within a definite and reasonable time, has sometimes been held an obstacle to the enforcement of a contract by the court.

Agreements to make an archway under a railway, or to construct a siding at a particular point for the convenience of the landowner, have been ordered to be specifically enforced. Although the party aggrieved might have obtained damages which would have been sufficient to have enabled him to pay for constructing them, and although the work to be done necessarily involved engineering skill as well as labor, he was not bound to assume the responsibility or the labor of doing that which the defendant had agreed to do. *Storer v. Great Western Railway*, 2 Yo. & Col. Ch. 48; *Greene v. West Cheshire Railway*, L. R. 13 Eq. 44. The case at bar is readily distinguishable from that of *Wollensak v. Briggs* (20 Bradw. [Ill.] 50), on which the defendant much relies. In that case, the defendant was to construct for the plaintiff certain improved machinery for a particular purpose, but no details were given as to the form, structure, principle, or mode of operating the proposed machine. It was obviously a contract too indefinite to enable the court to order its specific enforcement.

It is urged that specific performance of a part only of a contract will not be ordered when it is not in the power of the court to order the enforcement of the whole, and that it would not be possible to enforce that portion of the contract which relates to the application for letters patent in Canada, and the subsequent assignment of them. But where two parts of a contract are distinctly separable, as in the case at bar, there is no reason why one should

not be enforced specifically, and the plaintiff compensated in damages for the breach of the other.

When a contract relates to but a single subject, and it is impossible for the defendant to perform it, except partially, the plaintiff is entitled to the benefit of such partial performance, and to compensation, if it be possible to compute what is just, so far as it is unperformed. It was therefore held in *Davis v. Parker* (14 Allen, 94), that where one had agreed to convey land with release of dower, and was unable to procure a release of dower, the purchaser was entitled to a conveyance without such release, with an abatement from the purchase money of the value of the wife's interest at the time of conveyance. See also *Milkman v. Ordway*, 106 Mass. 232, 253; *Curran v. Holyoke Water Power Co.*, 116 Mass. 90.

We have assumed, in favor of the defendant's contention, that the only relief that the plaintiff could obtain for the breach of that portion of the agreement which relates to the application for a patent in Canada, for the improvements which the defendant had made, would be in damages. We have not intended thus to decide. That equity, by virtue of its control over the persons before the court takes cognizance of many things which they may do or be able to do abroad, while they are themselves personally here, will not be controverted. One may be enjoined from prosecuting a suit abroad. He may be compelled to convey land situated abroad, although the conveyance must be according to the laws of the foreign country, and must be sent there for record. *Pingree v. Coffin*, 12 Gray, 288; *Dehon v. Foster*, 4 Allen, 545; *Cunningham v. Butler*, 142 Mass. 47; *Newton v. Bronson*, 13 N. Y. 587; *Bailey v. Ryder*, 10 N. Y. 363.

There is nothing to show that the defendant, in making his application in Canada for the patent, is compelled to leave the State, any more than he would be compelled to do so if he was an applicant at Washington. The grant of such a patent is an act of administration only. If it were to be granted here, the party would be ordered to make application. It was held in *Runstetter v. Atkinson* (MacArthur & Mackey 382), that where a formal assignment of an invention had not been made, but a valid agreement had been made to assign, equity would order the party to make the formal assignment, and also to make application for the patent which, in such case, would issue to the assignee. The laws of Canada, which we can know only as facts, are not before us by any allegations as to them. If all that is required by them is a

formal application in writing by the inventor, there would seem to be, from the allegations of the bill, sufficient reason why the defendant should be required to make and forward it, or place it in the hands of the plaintiff to be forwarded to the Canadian authorities.

In any event, as the application is preliminary only to obtaining letters patent for the purpose of assigning them to the plaintiff, the averments of the bill taken in connection with the terms of the agreement set forth a good reason why the plaintiff may ask an assignment of his title to the improvements in question from the defendant, so far as the Dominion of Canada is concerned, and also why the defendant should be restrained from alienating or in any way incumbering any right he may have to letters patent from Canada, if the plaintiff should decide to seek his remedy in this form, rather than in damages for breach of this part of the contract.

Demurrer overruled.⁵⁰

Remedy for breach: injunction.

CORT *v.* LASSARD *et al.*

18 OREGON, 221.—1889.

LORD, J. This is a suit wherein the plaintiff, who is a theatrical manager, seeks to enjoin and prevent the defendants, who are acrobats, from performing at a rival theater in the same place. The plaintiff alleges, among other things, that the plaintiff and defendants entered into a contract whereby it was agreed that the defendants were to perform as acrobats, exclusively for the plaintiff, during a period of six weeks, at a salary of \$60 per week, etc., that the plaintiff has performed all the conditions of his said contract, and gone to large expense in advertising, etc., and would have derived large emoluments from the performance of the defendants, which are alleged to be unique and attractive; that said defendants, after

⁵⁰ "While it may be conceded that in general a court of equity will not take upon itself to make such decree where chattel property alone is concerned, its jurisdiction to do so is no longer to be doubted, and it is believed that no good reason exists against its exercise in any case where compensation in damages would not furnish a complete and satisfactory remedy."—Danforth, J., in *Johnson v. Brooks*, 93 N. Y. 337. See also *Rothholz v. Schwartz*, 46 N. J. Eq. 477; *Gottschalk v. Stein*, 69 Md. 51; *Eckstein v. Downing*, 64 N. H. 248; *Thurston v. Arnold*, 43 Iowa 43.

performing for the plaintiff for the space of three weeks, refused to perform longer, and engaged themselves to perform as acrobats at another theater mentioned, in said city; and that said performance of the said defendants will attract large crowds, etc., and will largely diminish, if permitted to be given, the receipts of the plaintiff, and cause an irreparable loss, etc., and diminish the attractions of his said theater, etc.; that the said defendants are entirely impecunious, and unable to respond to an action for a breach of the contract, etc. The answer denies nearly all the material allegations, but admits the hiring, etc., and then avers affirmatively that the plaintiff failed to fulfill his part of the contract, etc., and that the plaintiff discharged them, etc.; all of which was put in issue by the reply. Upon all the issues presented by the pleadings, the finding of the court was favorable to the plaintiff, with this exception: "That the performance of the said defendants was not of an unique or unusual character, but that of an ordinary acrobat and tumbler, which could have been easily supplied, with little or no delay or expense; and that said service was of a common and ordinary character, and not such as could be enjoined in equity for a breach of contract to perform," etc. As a result, the court found, as a conclusion of law, that the plaintiff was not entitled to any relief in equity, and that his suit be dismissed. The contention of counsel for the plaintiff is to this effect: (1) That it is immaterial whether the performance is unique, or involves special knowledge or skill; and (2) that the finding is contrary to the evidence, which will show that the performance was unique and unusual. In this case, there is no negative clause in the contract; but the suit, as decided by the court, assumes and admits that such a stipulation is not a prerequisite to the exercise of jurisdiction, but that it is enough to warrant equity to interfere if the contract alleged to have been broken stipulated for services which are unique and extraordinary in their character, or which involve special skill or knowledge or ability, and provided that such services were to be rendered at a particular place or places, and for a specified time.

The question whether a court of equity will apply the preventive remedy of injunction to contracts for the services of professional workers of special merit, or leave them to the remedy at law for damages, has been the subject of much discussion, and the existence of the jurisdiction fully established. It is not, perhaps, possible, nor is it necessary, to reconcile the decisions; but the ground of the jurisdiction, as now exerted, rests upon the inadequacy of the

legal remedy. In an early English case, where the jurisdiction was invoked to prevent the actor Kean from performing at another theater upon a contract for personal services, at which there was a stipulation to the effect that he should not perform at any other theater in London during the period of his engagement, it was held, as the court could not enforce the positive part of the contract, it would not restrain by injunction a breach of the negative part. *Kemble v. Kean*, 6 Sim. 333. But this case was expressly overruled in *Lumley v. Wagner* (1 De Gex, M. & G. 604) upon a like contract for personal services, to sing, during a certain period of time, at a particular theater, and not to sing elsewhere without written authority, upon the ground that the positive and negative stipulations of such contract formed but one contract, and that the court would interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract. In delivering this opinion, among other things, the Lord Chancellor said:

“The agreement to sing for the plaintiff during three months at his theater, and during that time not to sing for anybody else, is not a correlative contract. It is, in effect, one contract; and though, beyond all doubt, this court could not interfere to enforce the specific performance of the whole of this contract, yet, in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theater must necessarily exclude the right to perform at the same time at another theater. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theater to which she agreed to attach herself. I am of opinion that if she had attempted, even in the absence of any negative stipulation, to perform at another theater, she would have broken the spirit and true meaning of the contract, as much as she would with reference to the contract into which she has actually entered.”

In *Montague v. Flockton* (L. R. 16 Eq. 189) it was held that an actor who enters into a contract to perform for a certain period at a particular theater may be restrained by injunction from performing at any other theater during the pendency of his engagement, notwithstanding that the contract contains no negative cause restricting the actor from performing elsewhere. Referring to *Lumley v. Wagner*, *supra*, the Vice-Chancellor said:

“It happened that the contract did contain a negative stipulation, and finding it there, Lord St. Leonard relied upon it; but I am satisfied that, if it had not been there, he would have come to the same conclusion, and

granted the injunction on the grounds that Mdle. Wagner, having agreed to perform at Mr. Lumley's theater, could not at the same time be permitted to perform at Mr. Gye's. But, however that may be, it is comparatively unimportant, because the subsequent authorities have completely settled this point."

As a result of these English authorities, while conceding that specific performance of such contracts could not be enforced, the jurisdiction is established that relief may be granted on a contract for such services, even though it contains no negative clause, upon the ground that a contract to act or play at a particular place for a specified time necessarily implies a prohibition against performing at any other place during that period. The American courts, while they recognize the existence of the jurisdiction, have exhibited much hesitancy in applying it to such enlarged uses. Until *Daly v. Smith* (49 How. Pr. 150) was decided, the doctrine of *Lumley v. Wagner*, *supra*, was either entirely rejected or only partially accepted. *Sanquirico v. Benedetti*, 1 Barb. 315; *Hamblin v. Dinneford*, 2 Edw. Ch. 528; *Fredricks v. Mayer*, 13 How. Pr. 566; *Butler v. Galletti*, 21 How. Pr. 465; *Burton v. Marshall*, 4 Gill. 487; *Hayes v. Willio*, 11 Abb. Pr. (N.S.) 167. In that case (*Daly v. Smith*, *supra*) the authorities are carefully discriminated, and the injunction was granted restraining an actress from violating her agreement to play at the plaintiff's theater for a stated period; and the case is on all fours with *Lumley v. Wagner*, *supra*. See also *Hahn v. Society*, 42 Md. 465; *McCaull v. Braham*, 16 Fed. Rep. 37. In *Fredricks v. Mayer* (13 How. Pr. 567) and *Butler v. Galletti* (21 How. Pr. 466) the court indicates the principle that where the services involve the exercise of powers of the mind, as of writers or performers, which are purely and largely intellectual, they may form a class in which the court will interfere, upon the ground that they are individual and peculiar.

In these cases the element of mind furnishes the rule of distinction and decision, as distinguished from what is mechanical and material, and would exclude professional workers, such as dancers and acrobats, whose performances are largely mechanical, however unique or extraordinary such performance may be. But it is apprehended that this distinction cannot be maintained, for the fact is that such actors do often possess special merit of extraordinary qualifications in their line, which makes their professional performances distinctly personal and peculiar; and that,

in case of their default on a contract for services, there would be the same difficulty in supplying their places, or in obtaining from others the same service, as would happen with actors whose merits were largely intellectual, showing the same reason to exist as much in the one case as the other for the application of the preventive remedy by injunction. Relative to this subject, the authorities indicate that the American courts have refused to interfere, unless there was a negative clause forbidding the services sought to be enjoined. Such a stipulation existed in the contract in *Daly v. Smith, supra*, upon which relief was granted, although the opinion is broad enough to include contracts without such stipulations, when the facts show that the contract is reasonable, the complainant without fault, and that he has no adequate remedy at law. To my mind, this is the correct principle to apply to such cases, even though the contract contains no negative stipulation; for, in the nature of things a contract to act at a particular theater for a specified time necessarily implies a negative against acting at any other theater during that time. The agreement to perform at a particular theater for a particular time, of necessity involves an agreement not to perform at any other during that time. According to the true spirit of such an agreement, the implication precluding the defendant from acting at any other theater during the period for which he has agreed to act for the plaintiff follows as inevitably and logically as if it was expressed. So that, according to all the authorities, where one contracts to render personal service to another which requires special merit or qualifications in the professional worker, and, in case of default, the same service is not easily obtained from others, although the court will not interfere to enforce the specific performance of the whole contract, yet it will exert its preventive power to restrain its breach. While it is true that the court cannot enforce the affirmative part of such contract, and compel the defendant to act or perform, it can enjoin its breach, and compel him to abstain from acting elsewhere than at the plaintiff's theater. The principle upon which this doctrine rests is that contracts for such services are individual and peculiar, because of their special merit or unique character, and the inadequacy of the remedy at law to compensate for their breach in damages.

“Where,” says Professor Pomeroy, “a contract stipulates for a special, unique, or extraordinary personal service or acts, or for such services or

acts to be rendered or done by a person having special, unique, and extraordinary qualifications, as, for example, by an eminent actor, singer, artist, and the like, it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same, or the same kind of services or acts elsewhere, or by employing any other person." Pom. Eq. Jur., § 1343.

Damages for a breach of such contracts are not only difficult to ascertain, but cannot, with any certainty, be estimated; nor could the plaintiff procure, by means of any damages, the same services in the labor market, as in the case of an ordinary contract of employment between an artisan, a laborer, or a clerk, and their employer.

It results, then, that if the services contracted for by the plaintiff to be rendered by the defendants were unique or extraordinary, involving such special merit or qualifications in them as to make such services distinctly personal and peculiar, so that in case of a default by them, the same or like services could not be easily procured, nor be compensated in damages, the court would be warranted in applying its preventive jurisdiction and granting relief; but, otherwise, or denied, if such services were ordinary, and without special merit, and such as could be readily supplied or obtained from others without much difficulty or expense. But the present case is far from being one of such character as falls under the principle of the authorities in which the preventive remedy by injunction has been allowed. There is absolutely nothing in the evidence to show that the performances of the defendants were unique or of any special merit. The plaintiff himself will not even admit that they are; while others say the performances were "great," "pretty good," "do a fair act," etc.; and others, that their performances were merely that of the ordinary acrobat, and that there would be no trouble in supplying their places, or, as one of a good deal of professional experience says, "in getting a thousand to do just as good variety business."

Indeed, according to our view of the evidence, the plaintiff fails to make a case within the principle in which equity allows a relief for a breach of contract for personal services, and the court below committed no error in dismissing the bill.

Discharge of right of action by consent of the parties.KROMER *v.* HEIM.

75 NEW YORK, 574.—1879.

Appeal from order of the General Term of the Superior Court of the city of New York, affirming an order of special term denying a motion on the part of defendant to set aside an execution issued upon judgment herein, and to have the judgment satisfied of record.

On June 24, 1876, plaintiff obtained a judgment herein for \$1334.08. On July 26, 1876, and pending a stay of execution, plaintiff's attorney executed and delivered to defendant a written stipulation, in and by which plaintiff agreed to accept in settlement of the judgment, if paid within a year, \$3000 in cash and an assignment of defendant's interest in a certain patent right and of the assets of such patent business, or to accept \$1000 in cash, \$250 down and the balance in instalments, and merchandise to be delivered in amounts stated, sufficient, with the cash payments, to reduce the judgment to \$1000, and an assignment of said patent interests. Defendant paid the \$250 down, and made the other cash payments and deliveries of merchandise, as specified in the second alternative of the stipulation, until the judgment was reduced to less than \$1000, all of which payments were received by plaintiff without objection. Defendant then executed and tendered to plaintiff an assignment of the patent interests as required, which plaintiff declined to accept, but issued an execution to collect the balance of the judgment.

ANDREWS, J. "Accord," says Sir Wm. Blackstone, "is a satisfaction agreed upon between the party injuring and the party injured; which, when performed, is a bar to all actions upon this account." 3 Bl. Com. 15. An accord executory without performance accepted is no bar; and tender of performance is insufficient. Bac. Abr. tit. Accord and Satisfaction, C. So also accord with part execution cannot be pleaded in satisfaction. The accord must be completely executed to sustain a plea of accord and satisfaction. Bac. Abr. tit. Accord and Satisfaction, A; *Cock v. Honychurch*, T. Ray. 203; *Allen v. Harris*, 1 Ld. Ray. 122; *Lynn v. Bruce*, 2 H. Bl. 317. In *Peytoe's Case* (9 Co. 79) it is said, "and every accord ought to be full, perfect, and complete; for if

divers things are to be done and performed by the accord, the performance of part is not sufficient, but all ought to be performed." The rule that a promise to do another thing is not a satisfaction, is subject to the qualification that where the parties agree that the new promise shall itself be a satisfaction of the prior debt or duty, and the new agreement is based upon a good consideration, and is accepted in satisfaction, then it operates as such, and bars the action. *Evans v. Powis*, 1 Exch. 601; *Kinsler v. Pope*, 5 Strobbart, 126; Pars. on Cont. 683, note.

An exception to the general rule on this subject has been allowed in cases of composition deeds, or agreements between a debtor and his creditors; and they have been held, upon grounds peculiar to that class of instruments, to bar an action by a separate creditor, who had signed the composition to recover his debt, although the composition agreement was still executory. *Good v. Cheesman*, 2 Barn. & Ad. 335; *Bayley v. Homan*, 3 Bing. N. C. 915. The doctrine which has sometimes been asserted that mutual promises which give a right of action may operate and are good, as an accord and satisfaction of a prior obligation, must, in this State, be taken with the qualification that the intent was to accept the new promise, as a satisfaction of the prior obligation. Where the performance of the new promise was the thing to be received in satisfaction, then, until performance, there is not complete accord; and the original obligation remains in force. *Russell v. Lytle*, 6 Wend. 390; *Daniels v. Hallenbeck*, 19 Id. 408; *Hawley v. Foote*, Id. 516; *The Brooklyn Bank v. DeGrauw*, 23 Id. 342; *Tilton v. Alcott*, 16 Barb. 598.

Applying the well-settled principles governing the subject of accords to this case, the claim that the plaintiff's judgment is satisfied cannot be maintained. There is no ground to infer that the agreement of July 26, 1876, was intended by the parties to be or was accepted as a substitute for or satisfaction of the plaintiff's judgment. It was in effect a proposition on the part of the plaintiff, in the alternative, to accept \$3000 in cash, if paid within one year, and the assignment of the patent and avails of the patent business, in full of the judgment of \$4334.08, or to accept \$1000 in cash, in instalments, and the balance in merchandise, until the judgment should be reduced to \$1000; and for that balance to accept the assignment of the patent interests.

The defendant had the election between the alternatives presented by the plaintiff. He elected the latter, and paid the

\$1000, and supplied the merchandise, until the debt was reduced to \$1000, and then tendered the assignment of the patent interests, which the plaintiff refused to accept.

The judgment clearly was to remain in force until the satisfaction under the new agreement was complete. It is the case of an accord partly executed. So far as the plaintiff accepted performance, his claim was extinguished. So far as it was unexecuted, the judgment remained in full force; and however indefensible in morals it may be for the plaintiff to refuse to abide by the agreement in respect to the patent interests, he was under no legal obligation to accept the assignment tendered; and he had the legal right to enforce the judgment for the balance remaining unpaid.

It is clear that the right to supply the merchandise was for the benefit of the defendant. The plaintiff gave him the option to pay \$3,000 in cash, and assign the patent interests, or to pay \$3334.08 in merchandise and assign the patent interests. The merchandise was to be furnished on "as favorable terms as would be allowed by Hoyt & Co., or New York rates for cash sales." It gave the plaintiff no benefit beyond what he would derive by any purchase in the open market of the same kind of goods. It is quite clear that the defendant preferred to pay \$3334.08 in merchandise to paying \$3000 in cash.

We think that no distinction arises upon the circumstances to take the case out of the general rule, that an unexecuted accord cannot be treated as a satisfaction.

The order should be affirmed. All concur.

Order affirmed.

ALDEN *v.* THURBER *et al.*
149 MASSACHUSETTS, 271.—1889.

Contract for breach of agreement to sell goods. Verdict for defendant.

MORTON, C. J. The defendants agreed to sell to the plaintiff about ten thousand pounds of pure raspberry jam. They sent the jam to the plaintiff at Boston, and he remitted to them \$1000 in part payment of the agreed price. After the receipt of the jam the plaintiff found and claimed that it was not pure raspberry jam,

such as the contract called for. Some correspondence ensued between the parties, and on January 22, 1883, the defendants wrote to the plaintiff as follows:

"I regret very much your dissatisfaction about that lot of raspberry jam. Having seen the attorney's letter, I spoke to Mr. H. K. Thurber about it, and after discussing the matter, he desires me to say that, notwithstanding the fact that Mr. Chase insists that the goods were like the sample, he is willing to receive the whole lot back and credit it up to you, together with all freight charges, and in this way settle the matter, as we do not care to lose your trade, and we always desire to give our customers satisfaction. Advise us when and how you ship the jam."

Upon the receipt of this letter, the plaintiff sent back the jam, except one keg which had been sold, and requested the defendant to "remit our money at once." The defendants thereupon credited the plaintiff with the jam returned, and the expenses of freight and cartage, and remitted to the plaintiff the balance of the \$1000 due him.

This was a mutual rescission of the contract. The letter of the defendants was an offer to settle and compromise the controversy between the parties. The acts and conduct of the plaintiff were an acceptance of that offer. This was a waiver of the right to sue for any preceding breach of the contract. The performance by the defendants of the new agreement operated as an accord and satisfaction for any breach, and discharged the old contract. Such was clearly the intention of the defendants, and as the plaintiff accepted their offer unconditionally, and thus induced them to perform it, he cannot now say that he had a concealed intention not to discharge the prior breaches of the contract. This would be bad faith. *Rogers v. Rogers*, 139 Mass. 440.

For these reasons, we are of opinion that the Superior Court rightly directed a verdict for the defendants on the first count.

Judgment on the verdict.⁵¹

Discharge of right of action by the judgment of a court.

MILLER *v.* COVERT.

1 WENDELL (N. Y.), 487.—1828.

Action for work and labor. Set-off by defendant for hay sold and delivered. Judgment for defendant.

⁵¹ See also *McCreery v. Day*, 119 N. Y. 1.

Plaintiff proved a claim for work and labor for \$4.16. Defendant proved the sale and delivery to plaintiff of three tons of hay at \$8 a ton.

Plaintiff proved that before the beginning of this suit the defendant had sued out an attachment against plaintiff, on the trial of which defendant proved the sale and delivery of one ton and nineteen hundredweight of hay on a contract for three tons, and said if A. R. were present he could prove the whole, but that he would reserve the remainder as there were accounts between the parties. Judgment for the one ton and nineteen hundredweight had been paid.

The court refused to charge that defendant could not set off the remainder of the demand in this action, and charged that he was not barred by the former suit.

SUTHERLAND, J. The court below erred in permitting Covert, the defendant, to prove and set off against Miller his account for the balance of the three tons of hay sold and delivered to him in January, 1827. The sale of the hay was by one single indivisible contract. Miller agreed to purchase three tons of hay from Covert, and Covert agreed to sell it to him if he had so much to spare, and in the course of a few days delivered the whole. It is perfectly settled, that if a plaintiff bring an action for a part only of an entire and indivisible demand, the verdict and judgment in that action are a conclusive bar to a subsequent suit for another part of the same demand. The cases of *Smith v. Jones* (15 Johns. R. 229), of *Farrington & Smith v. Payne* (15 Johns. R. 432), of *Willard v. Sperry* (16 Johns. R. 121), and *Phillips v. Berick* (16 Johns. R. 136) are precisely in point. If Covert could not have brought an action for the residue of the three tons of hay, he of course could not avail himself of it by way of set-off when sued by Miller.

Judgment reversed.

ALLEN v. COLLIERY ENGINEER'S CO.

46 ATLANTIC REPORTER (PA.), 899.—1900.

Action by William D. Allen against the Colliery Engineer's Company for wages under a contract of employment. From a judgment in favor of defendant on a demurrer to the surrebutter, plaintiff appeals. Reversed.

FELL, J. The Judgment appealed from was entered on a demurrer to a surrebutter. We are asked, however, to determine the right of the plaintiff to recover without regard to the technical questions raised by the pleadings. The facts alleged are that the plaintiff was employed by the defendant as a manager of a branch of its business for one year, beginning January 12, 1898, at a salary of \$75 per week. On July 2, 1898, he was discharged without cause. On July 18th, he sued the defendant for two weeks' salary in the district court of the city of Brooklyn, N. Y., and recovered a judgment therefore, which has been paid. This action was brought after the expiration of the time for which the plaintiff was employed to recover the salary for the balance of the year. The defendant pleaded the recovery of the judgment in New York in bar. It is conceded that while the plaintiff was in the employ of the defendant he could have maintained a separate action for each week's salary as it became due; but it is contended that after his discharge his only remedy was an action for damages for the breach of the contract, and that, as there can be but one recovery on that ground, he is concluded by the action brought in New York.

The generally recognized rule is that an employe for a fixed period, who has been wrongfully discharged, may either treat the contract as existing, and sue for his salary as it becomes due, not on a *quantum meruit*, but by virtue of the special contract, his readiness to serve being considered as equivalent to actual service, or he may sue for the breach of contract at once or at the end of the contract period, but for the breach he can have but one action. 2 Smith, Lead. Cas. 38, note to *Cutter v. Powell*; 7 Am. Law Reg. (N. S.) 148, note to *Huntington v. Railroad Co.* Our cases are in entire harmony with this rule. In *Algeo v. Algeo* (10 Serg. & R. 235), it was held that, where the performance of services had been prevented by the discharge of the employe, he must declare on the special agreement, and could not recover on the implied promise, as the law would infer a promise from the acts of the plaintiff only, and not from the acts of prevention by the defendant. In *Telephone Co. v. Root* (Pa. Sup.) 4 Atl. 828, the plaintiff sued during the contract period on an agreement which, as in this case, was severable because the consideration was apportioned. In the opinion in *Kirk v. Hartman* (63 Pa. St. 97), it was said by Sharswood, J., that a servant dismissed without cause before the expiration of a definite period

of employment could maintain an action of debt on the special agreement.

It follows that if the recovery in the New York court was for the installments of salary then due, as alleged in the declaration in this case, the plaintiff may maintain his action; if it was for damages for the breach of the contract as averred in the plea filed, he is concluded by it. There is nothing in the record before us which throws any light upon this question, and the case must go back for decision in the common pleas.

The judgment is reversed, with a procedendo.

Discharge of right of action by lapse of time.

MANCHESTER *et al* v. BRAEDNER.

107 NEW YORK, 346.—1887.

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 9, 1885, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was commenced June 20, 1882, to recover for building materials furnished and delivered by plaintiffs to defendant. The defense was the statute of limitations.

It appeared that defendant in February, 1876, entered into an agreement with one Hoover, who was engaged as contractor in building certain houses, to do all the plastering for a sum agreed upon, payable in instalments as the work progressed. Plaintiffs agreed to furnish the materials, defendant agreeing to pay therefor in cash as wanted. In pursuance of this agreement plaintiffs furnished, between March 1 and June 12, 1876, materials from time to time as ordered. About that time Hoover became embarrassed and abandoned the work. The sub-contractors, and among them defendant, entered into an arrangement with Hoover to continue the work, and defendant delivered to plaintiffs three orders on Hoover, dated June 21, 1876, for sums aggregating the amount of their bill, payable, as the work progressed, from the sums coming to him under his contract. Defendant resumed his work, but in a few days abandoned it and refused to go on with the same.

ANDREWS, J. When one delivers to another an order on a third person to pay a specified sum of money to the person to whom the order is given, the natural import of the transaction is, that the drawee is indebted to the drawer in the sum mentioned in the order, and that it was given to the payee as a means of paying or securing the payment of his debt. In other words, it implies the relation of debtor and creditor between the parties to the extent of the sum specified in the order and a willingness on the part of the debtor to pay the debt. The transaction may be consistent with a different relation and another purpose, but in the absence of explanation, that is its natural and ordinary meaning. See *Bogert v. Morse*, 1 N. Y. 377. The oral evidence shows that the defendant was owing the plaintiffs the amount specified in the several orders of June 21, 1876, and that they were given to secure the payment of the debt, thus fully corroborating the inferences deducible from the orders themselves. We think the orders constituted an acknowledgment in writing of the debt, within section 110 of the Code, and continued the debt for the period of six years from their date. The decisions as to what is a sufficient acknowledgment of a debt, to take it out of the statute, are very numerous and not altogether harmonious. It seems to be the general doctrine that the writing, in order to constitute an acknowledgment, must recognize an existing debt, and that it should contain nothing inconsistent with an intention on the part of the debtor to pay it. But oral evidence may be resorted to, as in other cases of written instruments, in aid of the interpretation. Consistently with this rule, it has been held that oral evidence is admissible to identify the debt and its amount, or to fix the date of the writing relied upon as an acknowledgment, when these circumstances are omitted (*Kincaid v. Archibald*, 73 N. Y. 189; *Lechmere v. Fletcher*, 3 Tyrw. 450; *Bird v. Gammon*, 3 Bing. N. C. 883), or to explain ambiguities. 1 Smith's Lead. Cas. 960, and cases cited. The promise to be inferred from the order was not conditional in the sense that the debt was to be paid only out of the fund in the hands of the drawee. At most, there was an appropriation of that fund for the payment of the debt, but the language of the orders did not impart that the debt was to be paid only out of the fund against which they were drawn. See *Winchell v. Hicks*, 18 N. Y. 558; *Smith v. Ryan*, 66 Id. 352. The defendant by his own act in abandoning the contract with Hoover, the drawee, prevented the payment of the orders and left

him subject to the general obligation of payment resting upon all debtors.

The judgment should be affirmed. All concur.

Judgment affirmed.

ENGINEERING CASES: EXCERPTS FROM DECISIONS.

CONDITIONS.

Where the charter of a municipality requires that all contracts shall be countersigned by the comptroller, mayor, etc., it is a condition necessary to the validity of the contract that such signature be obtained. *Holmes v. Avondale*, 11 Ohio Cir. Ct. R., 430; *City of Superior v. Morton*, 63 Fed. Rep. 357.

In a case where commissioners were given power to employ labor and purchase materials to construct waterworks or to let the work by contract, it was held that having decided to do the work by contract, they must let the contract strictly as provided by the law, and that any deviation made the contract void and the contractor without remedy. *Dickinson v. City of Poughkeepsie*, 75 N. Y. 65.

SECTION IV.

BY IMPOSSIBILITY OF PERFORMANCE.

It may be impossible to perform the contract because of some obstacle appearing on its face, or there may be a latent impossibility not known to the parties. Again, there may appear after the contract is made some condition rendering the performance impossible.

1. An agreement obviously impossible of performance is void. There is no contract because there is no consideration for one of the promises. The question is one of intent, and the law will presume that the parties did not intend to contract for the performance of that which each must have known to be impossible.

2. Where a mutual mistake has been made as to the existence of the subject-matter of the agreement, making it impossible of performance, there is no contract.¹

¹ *Brick Co. v. Pond*, 38 Ohio St. 65.

3. An agreement possible of performance when made, will be enforced although some natural cause may afterward render performance impossible, unless such contingency is provided against directly or by implication in the contract itself.² This is the general rule.

4. An exception is found in the case where a contract is rendered by law wholly or partly impossible of performance; to that extent it is discharged.³

5. Another exception occurs where the continued existence of a specific thing is necessary to the complete performance of the contract and this thing is destroyed through no fault of either party; the destruction then operates as a discharge.⁴

6. The third exception is that of a contract for personal service, depending for possibility of performance upon the life or health of the party to perform. Such contracts are subject to the implied condition of the continuing life or health of such party.⁵

CASES.

SECTION IV.—DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE.

General principles governing impossibility of performance.

ANDERSON *v.* MAY.

50 MINNESOTA, 280.—1892.

Action for price of seeds. Defense, damages for breach of contract. Verdict for plaintiff. Defendant appeals.

GILFILLAN, C. J. The defendant having alleged as a counterclaim a contract in June, 1890, between him and plaintiff, whereby

² *Harmony v. Bingham*, 12 N. Y. 99; *Ward v. Hudson Bldg. Co.*, 5 N. Y. Sup. 319; *Tompkins v. Dudley*, 25 N. Y. 272; *Booth v. Spuyten Duwyl Rolling Co.*, 60 N. Y. 487; *Anderson v. May*, 550 Minn. 280; *Dermott v. Jones*, 2 Wall. (U. S.) 1.

³ *People v. Ins. Co.*, 91 N. Y. 174; *Jones v. Judd*, 4 N. Y. 411; *Hughes v. Wamsutta Mills*, 11 Allen (Mass.) 201; *Cordes v. Miller*, 39 Mich. 581.

⁴ *Dexter v. Norton*, 47 N. Y. 62; *Stewart v. Stone*, 127 N. Y. 500; *Walker v. Tucker*, 70 Ill. 527; *The Tornado*, 108 U. S. 342.

⁵ *People v. Ins. Co.*, 91 N. Y. 174; *Spalding v. Rosa*, 71 N. Y. 40; *Lacy v. Getman*, 119 N. Y. 109; *Johnson v. Walker*, 155 Mass. 253.

the latter agreed to sell and deliver to the former, on or before November 15th, certain quantities of specified kinds of beans, and that he failed so to do except as to a part thereof, the plaintiff, in his reply, alleged in substance that the contract was to deliver the beans from the crop that he should raise that year from his market gardening farm near Red Wing. Upon the trial the contract was proved by letters passing between the parties. From these it fairly appears that the beans to be delivered were to be grown by plaintiff, though it cannot be gathered from them that he was to grow the beans on any particular land. They contain no restriction in that respect. There can be no question that, if grown by him, and of the kinds and quality specified, defendant would have been obliged to accept the beans, though not grown on any land previously cultivated by plaintiff. The contract, therefore, was, in effect, to raise and sell and deliver the quantities, kinds, and quality of beans specified,—a contract in its nature possible of performance.

As an excuse for not delivering the entire quantity contracted for, the plaintiff relies on proof of the fact that an early unexpected frost destroyed or injured his crop to such extent that he was unable to deliver the entire quantity.

What, in the way of subsequently arising impossibility for the party to perform, will suffice as excuse for non-performance of a contract, is well settled in the decisions; the only apparent difference in them arising from the application of the rules to particular circumstances. The general rule is as well stated as anywhere in 2 Chit. Cont. 1074, thus: "Where the contract is to do a thing which is possible in itself, or where it is conditioned on any event which happens, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it; for it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. And therefore, in such cases, the performance is not excused by the occurrence of an inevitable accident, or other contingency, although it was not foreseen by, or within the control of, the party." An application of this rule is furnished by *Cowley v. Davidson*, 13 Minn. 92 (Gil. 86). What is sometimes called an "exception to the rule" is where the contract is implied to be made on the assumed continued existence of a particular person or thing, and the person or thing ceases to exist, as, where it is for personal service, and the person dies, or it is for repairs

upon a particular ship or building, and the ship or building is destroyed. An agreement to sell and deliver at a future time a specified chattel existing when the agreement is made would come under this exception. The exception was extended further than in any other case we have found in *Howell v. Coupland*, L. R. 9 Q. B. 462. That was a contract to sell and deliver a certain quantity from a crop to be raised on a particular piece of land and the entire crop was destroyed by blight. The court held the contract to be to deliver part of a specific thing, to wit, of the crop to be grown on a given piece of land, and held it to come within the rule that, where the obligation depends on the assumed existence of a specific thing, performance is excused by the destruction of the thing without the parties' fault. Without intimating whether we would follow that decision in a similar case, we will say that the case is unlike this, in that in this case the plaintiff was not limited or restricted to any particular land. It was not an undertaking to sell and deliver part of a specific crop, but a general undertaking to raise, sell, and deliver the specified quantity of beans. We have been cited to and found no case holding that, where one agrees generally to produce, by manufacture or otherwise, a particular thing, performance being possible in the nature of things, he may be excused from performance by the destruction, before completion or delivery, of the thing, from whatever cause, except the act of the other party. Applications of the general rule, where the thing agreed to be produced was, before completion, destroyed without the party's fault, are furnished in *Adams v. Nichols*, 19 Pick. 275, 279; *School Dist. v. Dauchy*, 25 Conn. 530; and *Trustees v. Bennett*, 27 N. J. Law, 513, approved and followed in *Steas v. Leonard*, 20 Minn. 494 (Gil. 448). Where such causes may intervene to prevent a party performing, he should guard against them in his contract.

Order reversed.

DERMOTT v. JONES.

2 WALLACE (U. S.), 1.—1864.

Action for contract price of a building. Defendant seeks to recoup for amount expended in perfecting the work. Judgment for plaintiff.

Plaintiff contracted to build a house for defendant on defend-

ant's soil, and covenanted that he would procure and supply all matters requisite for the execution of the work "in all its parts and details, and for the complete finish and fitting for use and occupation of all the houses and buildings, and the several apartments of the house and buildings, to be erected pursuant to the plan of the work described and specified in the said schedule; and that the work, and the several parts and parcels thereof, shall be executed, finished, and ready for use and occupation, and be delivered over, so finished and ready," at a day fixed. Jones built the house according to the specifications, except in so far as Miss Dermott had compelled him—according to his account of things—to deviate from them. Owing, however, to a latent defect in the soil, the foundation sank, the building became badly cracked, uninhabitable, and so dangerous to passers-by that Miss Dermott was compelled to take it down, to renew the foundation with artificial "floats," and to rebuild that part of the structure which had given way. This she did at a large expense. As finished on the artificial foundations the building was perfect.

Jones having sued Miss Dermott, in the Federal Court for the District of Columbia, for the price of building, her counsel asked the court to charge that she was entitled to "recoup" the amount which it was necessary for her to expend in order to render the cracked part of the house fit for use and occupation according to the plan and specifications; an instruction which the court refused to give. The court considered, apparently, that even under the covenant made by Jones, and above recited, he was not responsible for injury resulting from inherent defects in the ground, the same having been Miss Dermott's own; and judgment went accordingly. Error was taken here. Some other questions were presented in the course of the trial below, and referred to here; as, for example, How far, when a special contract has been made, a plaintiff must sue upon *it*? how far he may recover in a case where, as was said to have been the fact here, the plaintiff had abandoned his work, leaving it unfinished? how far "acceptance"—when such acceptance consisted only in a party's treating as her own a house built on her ground—waives non-fulfillment, there being no bad faith in the matter? and some questions of a kindred kind. The most important question in the case, however, was the refusal of the court to charge, as requested, in regard to the "recoupment"; and the correctness of that refusal rested upon the effect of Jones' covenant to deliver, fit for

use and occupation, in connection with the latent defect of soil upon which the foundation was built.

MR. JUSTICE SWAYNE. The defendant in error insists that all the work he was required to do is set forth in the specifications, and that, having fulfilled his contract in a workmanlike manner, he is not responsible for defects arising from a cause of which he was ignorant, and which he had no agency in producing.

Without examining the soundness of this proposition, it is sufficient to say that such is not the state of the case. The specifications and the instrument to which they are annexed constitute the contract. They make a common context, and must be construed together. In that instrument the defendant in error made a covenant. That covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him. He did not make that part of the building "fit for use and occupation." It could not be occupied with safety to the lives of the inmates. It is a well-settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. *Paradine v. Jane*, Ayleyn, 27; *Beale v. Thompson*, 3 Bosanquet & Puller, 420; *Beebe v. Johnson*, 19 Wendell, 500; 3 Comyn's Digest, 93.

The application of this principle to the class of cases to which the one under consideration belongs is equally well settled. If a tenant agree to repair, and the tenement be burned down, he is bound to rebuild. *Bullock v. Dommitt*, 6 Term, 650. A company agreed to build a bridge in a substantial manner, and to keep it in repair for a certain time. A flood carried it away. It was held that the company was bound to rebuild. *Brecknock Company v. Pritchard*, Id. 750. A person contracted to build a house upon the land of another. Before it was completed it was destroyed by fire. It was held that he was not thereby excused from the performance of his contract. *Adams v. Nichols*, 19 Pickering, 275. *Brumby v. Smith*, 3 Alabama, 123, is to the same effect. A party contracted to erect and complete a building on a certain lot. By reason of a latent defect in soil the building fell

down before it was completed. It was held (*School Trustees v. Bennett*, 3 Dutcher, 513, a case in New Jersey, cited by counsel) that the loss must be borne by the contractor. The analogies between the case last cited and the one under consideration are very striking. There is scarcely a remark in the judgment of the court in that case that does not apply here. Under such circumstances equity cannot interpose. *Gates v. Green*, 4 Paige, 355; *Holtzapffel v. Baker*, 18 Vesey, 115.

The principle which controlled the decision of the cases referred to rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated.

We are of opinion that the plaintiff below was entitled to recover, but that the court, in denying to the defendant the right of recoupment, committed an error which is fatal to the judgment.

We might here terminate our examination of the case; but as it will doubtless be tried again,—and the record presents several other points to which our attention has been directed,—we deem it proper to express our views upon such of them as seem to be material.

While a special contract remains executory the plaintiff must sue upon it. When it has been fully executed according to its terms, and nothing remains to be done but the payment of the price, he may sue on the contract, or in *indebitatus assumpsit*, and rely upon the common counts. In either case the contract will determine the rights of the parties.

When he has been guilty of fraud, or has wilfully abandoned the work, leaving it unfinished, he cannot recover in any form of action. Where he has in good faith fulfilled, but not in the manner or not within the time prescribed by the contract, and the other party has sanctioned or accepted the work, he may recover upon the common counts in *indebitatus assumpsit*.

He must produce the contract upon the trial, and it will be applied as far as it can be traced; but if, by the fault of the defendant, the cost of the work or materials has been increased, in so far, the jury will be warranted in departing from the con-

tract prices. In such cases the defendant is entitled to recoup for the damages he may have sustained by the plaintiff's deviations from the contract, not induced by himself, both as to the manner and time of the performance.

There is great conflict and confusion in the authorities upon this subject. The propositions we have laid down are reasonable and just, and they are sustained by a preponderance of the best considered adjudications. *Cutter v. Powell*, 2 Smith's Leading Cases, 1, and notes; Chitty on Contracts, 612, and notes.

Judgment reversed, and the cause remanded for further proceedings in conformity with this opinion.

Exception to general rule: legal impossibility.

CORDES *v.* MILLER.

39 MICHIGAN, 581.—1878.

Assumpsit on covenant in a lease. Defendant brings error.

COOLEY, J. Miller, on the fourth day of October, 1872,¹ rented of Cordes, for the term of ten years, a wooden building in Grand Rapids, at a specified annual rent. The lease contained a covenant on the part of Cordes that "if said building burns down during this lease, said Cordes agrees to rebuild the same in a suitable time, for said Miller." Miller went into possession and occupied the building for a restaurant and saloon until May 26, 1874, when it was destroyed by fire. Within a week Miller notified Cordes to rebuild, and some preparation to do so would appear to have been made by the removal of the debris of the fire. June 15, 1874, the common council of Grand Rapids passed an ordinance prohibiting the erection of wooden buildings within certain limits which embraced the site where the burned building had stood. Cordes afterwards went on and prepared plans and specifications for a larger brick building, and contracted for putting it up. Miller declined to examine the plans or to say anything about them, but in substance he said that when the building was completed he would move into it. It was completed in November, and in December Miller moved into a part of it, which was considered by the parties as being equivalent to the

old building. Complaining then that the new building was not put up in a suitable time, he brought this suit on the covenant.

The principal question in the case is whether such a suit can be maintained. No question is made of the validity of the city ordinance, and it is urged on behalf of the lessor that as the putting up of such a structure as was originally leased was thereby rendered impossible, the covenant was discharged. *Brady v. Insurance Co.*, 11 Mich. 425. On the other hand, it is argued that rebuilding is not impossible; it is only rebuilding of a specified material that is forbidden; and that Cordes, when he rented his building and agreed to rebuild in case of fire, took upon himself all the risks of being compelled to make use of some other material than wood, as much as he did the risk of the rise in the cost of materials. Some stress is also laid upon the fact that the lease did not mention the material of which the old building was constructed. The court below sustained the action.

If this judgment is correct, then Cordes had placed himself under legal obligation not only to put up a new building of some more substantial material than wood, no matter how much greater might be the cost, and to turn it over to Miller for the term at the same rent, no matter how much more the occupation might be worth. Moreover, he would be obliged to reproduce the old building, as near as the change in material would permit, and could not compel his lessee to accept a building differently planned, subdivided, and arranged, even though it might be better and at least equally convenient. In other words, in the enforced change of material Cordes could not consult his own interest in making such modifications as the change would be likely to render important and desirable, but would be tied down to the plan and arrangement of a building which it might be well enough to reproduce in the old material, but which would never be chosen if the material were to be brick, stone, or iron.

We cannot think this the fair construction of the lease. Cordes covenanted to rebuild, if destroyed by fire, the building he leased; but did not covenant that if not allowed to rebuild that, he would put up another on the same plan, of more substantial and presumably more costly material. Had the exact contingency which has since happened been in the minds of the parties at the time, it is scarcely conceivable that the lessor would have consented to put up a brick building in place of the one leased, and to receive for it the same rent the wood building

brought him, when its probable rental value would be considerably greater, and its cost presumably more.

Had this been an agreement by a builder to rebuild the old building, it would scarcely be urged that the covenant would bind him to erect a new one differing from it so radically as would a brick or stone structure from one of wood. Had Cordes been selling this land to Miller with a similar agreement respecting the building, it would be equally plain that the change in the law could not work a change in his contract so seriously increasing his responsibility. But in principle the cases suggested would not differ from this in the least. Cordes undertook for something which by a change in the law has become illegal; and his covenant has thereby been discharged.

In this case Cordes prepared accommodations for Miller which the latter has accepted and now occupies. But they were different from the old, and Miller could not have been compelled to accept them. The arrangement was, therefore, one outside the lease,—not one in compliance with its terms. Probably the course of the parties has in effect been equivalent to an offer on one side and an acceptance on the other of the new quarters in place of the old and under the old lease; but no question concerning that arrangement arises here.

The judgment must be reversed, and judgment entered for Cordes with costs of both courts.

The other justices concurred.⁶

HUGHES *v.* WAMSUTTA MILLS.

11 ALLEN (Mass.), 201.—1865.

Contract for work. Verdict for plaintiff.

Plaintiff agreed that if he left without giving two weeks' notice he should receive nothing for wages due. He was arrested and convicted of a crime and sentenced to jail. The damage to defendant from want of notice was greater than the wages due.

BIGELOW, C. J. The question at issue between the parties to this suit depends entirely on the construction of the contract

⁶ See also *Jamieson v. Indiana Nat. Gas Co.*, 128 Ind. 555.

under which the plaintiff was employed. This, we think, is misapprehended by the counsel for the defendants. The interpretation which he seeks to put on the stipulation that the plaintiff was to receive no wages if he left the defendant's service without giving two weeks' previous notice of his intention so to do, is inconsistent with the terms of the stipulation, and too narrow to be a fair or reasonable exposition of the intention of the parties. The stipulation clearly had reference only to a voluntary abandonment of the defendants' employment, and not one caused *vi majore*, whether by the visitation of God or other controlling circumstances. Clearly the abandonment must have been such that the plaintiff could have foreseen it; he could give notice only of such departure as he could anticipate, and the stipulation that he was to have the privilege of leaving after giving two weeks' notice without forfeiting his wages implied that the forfeiture was to take place only when it would be within his power to give the requisite notice. It certainly cannot be contended that the stipulation was absolute; that he was to receive no wages in case of leaving without notice, whatever may have been the cause of his abandonment of the service. It is settled that absence from sickness or other visitation of God would not work a forfeiture of wages under such a contract. *Fuller v. Brown*, 11 Met. 440. *Pari ratione*, any abandonment caused by unforeseen circumstances or events, and which at the time of their occurrence the person employed could not control or prevent from operating to terminate his employment, ought not to operate to cause a forfeiture of wages.

It may be said that in the case at bar the commission of the offense for which the plaintiff was arrested was his voluntary act, and that the consequences which followed after it and led to his compulsory departure from the defendants' service are therefore to be regarded as bringing this case within the category of a voluntary abandonment of his employment. But the difficulty with this argument is, that it confounds remote with proximate causes. The same argument might be used in case of inability to continue in service occasioned by sickness or severe bodily injury. It might be shown in such a case that some voluntary act of imprudence or carelessness led directly to the physical consequences which disabled a party from continuing his service under a contract. The true and reasonable rule of interpretation to be applied to such contracts is this: To work a forfeiture of

wages, the abandonment of the employer's service must be the direct, voluntary act, or the natural and necessary consequence of some voluntary act of the person employed, or the result of some act committed by him with a design to terminate the contract or employment, or render its further prosecution impossible. But a forfeiture of wages is not incurred where the abandonment is immediately caused by acts or occurrences not foreseen or anticipated, over which the person employed had no control, and the natural and necessary consequence of which was not to cause the termination of the employment of a party under a contract for services or labor.

It results from these views that the plaintiff has not forfeited his wages by any breach of his contract, and that he is entitled to recover the full amount due to him for services, without any deduction for damages alleged to have been suffered by the defendants in consequence of his sudden departure from their employment.

Judgment on the verdict.

Exception to general rule: destruction of subject matter.

DEXTER *v.* NORTON *et al.*

47 NEW YORK, 62.—1871.

Appeal from a judgment entered upon an order of the General Term of the Supreme Court in the first judicial district, overruling plaintiff's exceptions, and directing judgment dismissing the complaint, in accordance with ruling of the court at circuit.

This action is brought to recover damages for a breach of a contract to sell and deliver cotton. Defendants, on the 5th day of October, 1865, at the city of New York, agreed to sell and deliver to the plaintiff 607 bales of cotton, bearing certain marks and numbers, specified in the contract, at the price of forty-nine cents per pound, and fourteen bales, bearing marks and numbers, specified in the written contract, at the price of forty-three cents per pound, the cotton to be paid for on delivery. Defendants delivered to the plaintiff 460 bales of the said cotton, the remaining 161 bales were accidentally destroyed by fire without fault or negligence of the defendants. Cotton rose in value after

the sale, and plaintiff claimed to recover the increase on the 161 bales. The court dismissed the complaint, upon the ground that a fulfillment of the contract by the sellers had become impossible by the destruction, without their fault, of the subject matter of the sale, and they were, therefore, excused from the obligation to perform their agreement. Plaintiff excepted.

CHURCH, C. J. The contract was for the sale and delivery of specific articles of personal property. Each bale sold was designated by a particular mark, and there is nothing in the case to show that these marks were used merely to distinguish the general kind or quality of the article, but they seem to have been used to describe the particular bales of cotton then in possession of the defendant. Nor does it appear that there were other bales of cotton in the market of the same kind, and marked in the same way. The plaintiff would not have been obliged to accept any other cotton than the bales specified in the bought note.

The contract was executory, and various things remained to be done to the 161 bales in question by the sellers before delivery. The title, therefore, did not pass to the vendee, but remained in the vendor. *Joyce v. Adams*, 8 N. Y. 291.

This action was brought by the purchaser against the vendor to recover damages for the non-delivery of the cotton, and the important and only question in the case is, whether upon an agreement for the sale and delivery of specific articles of personal property, under circumstances where the title to the property does not vest in the vendee, and the property is destroyed by an accidental fire before delivery without the fault of the seller, the latter is liable upon the contract for damages sustained by the purchaser.

The general rule on this subject is well established, that where the performance of a duty or charge created by law is prevented by inevitable accident without the fault of the party he will be excused, but where a person absolutely contracts to do a certain thing not impossible or unlawful at the time, he will not be excused from the obligations of the contract unless the performance is made unlawful, or is prevented by the other party.

Neither inevitable accident, nor even those events denominated acts of God will excuse him, and the reason given is that he might have provided against them by his contract. *Paradine v.*

Jane, Aley, 27; Harmony v. Bingham, 12 N. Y. 99; Tompkins v. Dudley, 25 N. Y. 272.

But there is a variety of cases where the courts have implied a condition in the contract itself, the effect of which was to relieve the party when the performance had, without his fault, become impossible; and the apparent confusion in the authorities has grown out of the difficulty in determining in a given case whether the implication of a condition should be applied or not, and also in some cases in placing the decision upon a wrong basis. The relief afforded to the party in the cases referred to is not based upon exceptions to the general rule, but upon the construction of the contract.

For instance, in the case of an absolute promise to marry, the death of either party discharges the contract, because it is inferred or presumed that the contract was made upon the condition that both parties should live.

So of a contract made by a painter to paint a picture, or an author to compose a work, or an apprentice to serve his master a specified number of years, or in any contract for personal services dependent upon the life of the individual making it, the contract is discharged upon the death of the party, in accordance with the condition of continued existence, raised by implication. 2 Smith's Leading Cases, 50.

The same rule has been laid down as to property: "As if A agrees to sell and deliver his horse Eclipse to B on a fixed future day, and the horse die in the interval, the obligation is at an end." Benjamin on Sales, 424. In replevin for a horse, and judgment of *retorno habendo*, the death of the horse was held a good plea in an action upon the bond. 12 Wend. 589. In *Taylor v. Caldwell* (113 E. C. L. R. 824) A agreed with B to give him the use of a music hall on specified days, for the purpose of holding concerts, and before the time arrived the building was accidentally burned; held, that both parties were discharged from the contract. Blackburn, J., at the close of his opinion, lays down the rule as follows: "The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance." And the reason given for the rule is, "because from the nature of the contract, it

is apparent that the parties contracted on the basis of the continued existence of the particular person or thing."

In *School District No. 1 v. Dauchy* (25 Conn. 530) the defendant had agreed to build a school-house by the first of May, and had it nearly completed on the twenty-seventh of April, when it was struck by lightning and burned; and it was held that he was liable in damages for the non-performance of the contract. But the court, while enforcing that general rule in a case of evident hardship, recognizes the rule of an implied condition in case of the destruction of the specific subject matter of the contract; and this is the rule of the civil law. Pothier on Contracts and Sale, art. 4, § 1, p. 31.

We were referred to no authority against this rule. But the learned counsel for the appellant, in his very able and forcible argument, insisted that the general rule should be applied in this case. While it is difficult to trace a clear distinction between this case and those where no condition has been implied, the tendency of the authorities, so far as they go, recognizes such a distinction, and it is based upon the presumption that the parties contemplated the continued existence of the subject matter of the contract.

The circumstances of this case are favorable to the plaintiff. The property was merchandise sold in the market. The defendant could, and from the usual course of business, we may infer, did protect himself by insurance; but in establishing rules of liability in commercial transactions, it is far more important that they should be uniform and certain than it is to work out equity in a given case. There is no hardship in placing the parties (especially the buyer) in the position they were in before the contract was made. The buyer can only lose the profits of the purchase; the seller may lose the whole contract price, and if his liability for non-delivery should be established, the enhanced value of the property. After considerable reflection, I am of the opinion that the rule here indicated of an implied condition in case of the destruction of the property bargained, without fault of the party, will operate to carry out the intention of the parties under most circumstances, and will be more just than the contrary rule. The buyer can of course always protect himself against the effect of the implied condition, by a provision in the contract that the property shall be at the risk of the seller.

Upon the grounds upon which this rule is based of an implied

condition, it can make no difference whether the property was destroyed by an inevitable accident, or by an act of God, the condition being that the property shall continue to exist. If we were creating an exception to the general rule of liability, there would be force in the considerations urged upon the argument, to limit the exception to cases where the property was destroyed by the act of God, upon grounds of public policy, but they are not material in adopting a rule for the construction of the contract so as to imply a condition that the property was to continue in existence. It can make no difference how it was destroyed, so long as the party was not in any degree in fault. The minds of the parties are presumed to have contemplated the possible destruction of the property, and not the manner of its destruction; and the supposed temptation and facility of the seller to destroy the property himself, cannot legitimately operate to affect the principle involved.

The judgment must be affirmed.

ALLEN, GROVER, and RAPALLO, JJ., concur; PECKHAM and FOLGER, JJ., dissent.

Judgment affirmed.⁷

ANGUS v. SCULLY.

57 NORTHEASTERN REPORTER (MASS.), 674.—1900.

Action by one Angus and others against one Scully to recover for services performed in moving a building. From a judgment in favor of plaintiffs, defendant excepts. Exceptions overruled.

HAMMOND, J. The contract was that the plaintiffs should move a large building belonging to the defendants from a lot on Third Street to a lot on First Street, and also change the location

⁷ See also *Stewart v. Stone*, 127 N. Y. 500. Where plaintiff has contracted to do something on a chattel or building which is destroyed after part performance, he may recover for the part performed. *Cleary v. Sohler*, 120 Mass. 210. In *Niblo v. Binssie* (3 Abb. App. Dec. 375) this is put on the ground that defendant impliedly contracts to keep the chattel or building in existence.

of two other buildings, of which one was on the First Street lot, and one on the Third Street lot; and the defendant was to pay the \$840. In accordance with the agreement, the plaintiffs began the work. "They first moved the house on the Third Street lot, and then began to move the large building from the Third Street lot across certain open lots toward the lot on First Street. When said last-named building had been moved about half the distance to said lot on First Street it was entirely consumed by fire at some time during the night, and thereupon, with the assent of the defendant, no further work was done in moving either of the other buildings."

In this action the plaintiffs seek to recover the fair value of the services rendered by them in the work done down to the time of the fire. The court refused to rule as requested by the defendant, that the plaintiffs could not recover, and submitted the case to the jury upon instructions which would authorize them to find for the plaintiffs if they were satisfied that the fire was not attributable to any negligence of the plaintiffs. We see no error in the rulings under which the case thus went to the jury. Clearly, one of the implied conditions of the contract was that the building should continue to exist. Upon the destruction of the building, the work could not be completed according to the contract.

Authorities differ as to the rights of the parties in such a case, but so far as respects this commonwealth the rule is well settled. As stated by Knowlton, J., in *Butterfield v. Byron* (153 Mass. 517, 523) "the principle seems to be that when, under an implied contract, the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied assumpsit for what has properly been done by either of them; the law dealing with it as done at the request of the other, and creating a liability to pay for its value, to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be made applicable." Stated more narrowly, and with particular reference to the circumstances of this case, the rule may be said to be that where one is to make repairs or do any other work on the house of another under a special contract, and his contract becomes impossible of performance on account of the destruction of the house without any fault on his part, then he may recover for what he has done. This case comes

clearly within this rule. *Lord v. Wheeler*, 1 Gray, 282; *Butterfield v. Byron*, *ubi supra*, and cases therein cited.

Exceptions overruled.⁸

Exception to general rule: the death or disability of the party contracting for personal service.

SPALDING *et al.* v. ROSA *et al.*

71 NEW YORK, 40.—1877.

Appeal from judgment of the General Term of the Supreme Court, in the third judicial department, in favor of defendants, entered upon an order overruling exceptions and directing a judgment upon an order on trial dismissing plaintiffs' complaint.

This action was brought by plaintiffs, who were the owners and managers of the Olympic Theater, in St. Louis, to recover damages for an alleged breach of contract by defendants. By the contract, defendants agreed to furnish the "Wachtel Opera Troupe," to give four performances per week at plaintiffs' theater for two weeks, commencing the 26th or 27th February, 1872, plaintiffs to receive twenty per cent of the gross receipts, up to \$1800 per week, and defendants the balance. Prior to the time specified in the contract, Wachtel, who was the chief singer and attraction, and who gave the name to the troupe, was taken sick, and at the time was unable to sing. Defendants in consequence did not furnish the troupe at the time specified.

The court at the close of the evidence directed a dismissal of the complaint, to which plaintiffs' counsel duly excepted. Exceptions were ordered to be heard at first instance at General Term.

ALLEN, J. The contract of the defendants was for four performances per week for two weeks, commencing on the 26th or 27th of February, 1872, by the "Wachtel Opera Troupe," at the plaintiffs' theater in St. Louis.

The "Wachtel Opera Troupe" was well known by its name as

⁸ In *Hysell v. Sterling Coal & Mfg. Co.* (W. Va.), 33 S. E. Rep. 95, the plaintiff contracted to put a tin roof on a house at \$5 per square, and when the work was nearly completed the house was burned. It was held that plaintiff could recover in *quantum meruit* for the work done.

the company at the time of making the contract, performing in operas, under temporary engagements, at the principal theaters and opera-houses in the larger cities of the United States, and composed of Wachtel as the leader and chief attraction, and from whom the company took its name, and those associated with him in different capacities, and taking the different parts in the operatic exhibitions for which they were engaged. The proof of the fact that there was a troupe or company known by that name, was competent, as showing what particular company was in the minds of the contracting parties, and intended, by the terms used, and as there was no controversy upon this subject, and no ambiguity arising out of the extrinsic evidence, there was no question of fact for the jury.

Wachtel had acquired a reputation in this country, as well as in Europe, as a tenor singer of superior excellence; and, in the language of the witnesses, had made a "decided hit" in his professional performances here. It was his name and capabilities that gave character to the company, and constituted its chief attraction to connoisseurs and lovers of music, filling the houses in which he appeared. His connection with the company was the inducement to the plaintiffs to enter into the contract, and give the troupe eighty per centum of the gross receipts of the houses, one-half of which went to Wachtel. Both the plaintiffs testified that it was Wachtel's popularity and capabilities as a singer upon which they relied to fill their theater and reimburse themselves for their expenses and make a profit. The appearance of Wachtel in the operas was the principal thing contracted for, and the presence of others of the company was but incidental to the employment and appearance of the "famous German tenor." The place of any other member of the company could have been supplied, but not so of Wachtel. His presence was of the essence of the contract, and his part in the performances could not be performed by a deputy or any substitute. The plaintiffs would not have been bound to accept, and would not have accepted the services of the troupe under the contract without Wachtel; it would not have been the "Wachtel Opera Troupe" contracted for without him.

There is no dispute as to the facts. The only question is one of law, as to the effect of the sickness, and consequent inability of Wachtel to fulfill the engagement, upon the obligations of the defendants. So far as this question is concerned, it must be treated as if the contract was for the performance by Wachtel alone; as if he was the sole performer contracted for. This follows from the

conceded fact that his presence was indispensable to the performance of the services agreed to be rendered by the entire company. In this view of the case, the legal question is very easy of solution, and can receive but one answer. The sickness and inability of Wachtel occurring without the fault of the defendants, constitutes a valid excuse for the non-performance of the contract. Contracts of this character, for the personal services, whether of the contracting party or of a third person, requiring skill, and which can only be performed by the particular individual named, are not, in their nature, of absolute obligation under all circumstances. Both parties must be supposed to contemplate the continuance of the ability of the person whose skilled services are the subject of the contract, as one of the conditions of the contract. Contracts for personal services are subject to this implied condition, that the person shall be able at the time appointed to perform them; and if he dies, or without fault on the part of the covenantor becomes disabled, the obligation to perform is extinguished. This is so well settled by authority that it is unnecessary to do more than refer to a few of the authorities directly in point. *People v. Manning*, 8 Cow. 297; *Jones v. Judd*, 4 N. Y. 411; *Clark v. Gilbert*, 26 N. Y. 279; *Wolfe v. Howes*, 24 Barb. 174, 666; 20 N. Y. 197; *Gray v. Murray*, 3 Johns. Ch. R. 167; *Robinson v. Davison*, L. R. 6. Excheq. 269; *Boast v. Firth*, Id.; 4 Com. Pleas, 1. The same principle was applied in *Dexter v. Norton* (47 N. Y. 62) and for the same reasons, to a contract for the delivery of a quantity of specified cotton destroyed by fire, without the fault of the vendor, intermediate the time of making the executory contract of sale and the time for the delivery.

The judgment must be affirmed. All concur, except FOLGER, J., absent.

Judgment affirmed.⁹

⁹ See also *Lacy v. Getman*, 119 N. Y. 109; *Parker v. Macomber*, 17 R. I. 674; *Dickinson v. Calahan's Adm'rs*, 19 Pa. St. 227.

NOTE. Wilful abandonment of contract prevents recovery for benefits already conferred by party in default, and renders him liable to respond in damages for the breach. *Stark v. Parker*, 2 Pick. 267; *Lawrence v. Miller*, 86 N. Y. 131. Contra: *Britton v. Turner*, 6 N. H. 481. But where full performance by plaintiff is impossible he may recover for benefits conferred. *Wolfe v. Howes*, 20 N. Y. 197; *Green v. Gilbert*, 21 Wis. 395; *Manhattan Life Ins. Co. v. Buck*, 93 U. S. 24. For recovery for benefits conferred upon abandonment of illegal contract, see *Duval v. Wellman*; *Bernard v. Taylor*.

ENGINEERING CASES: EXCERPTS FROM DECISIONS.

IMPOSSIBILITY.

The prevention of performance by destruction of a building before completion, if the contract is entire, will prevent recovery for any part. *L. R. 2 C. P. 651.*

A contract to perform a notorious impossibility, known to the parties to be such at the time of making the contract, is void. *15 M. & W. 253.*

In case of the loss of a vessel, the seaman is entitled to wages earned until time of such loss. *Rev. St. U. S. § 4526.*

An act of God usually excuses the performance of a contract. *New Haven & Northampton Co. v. Quintard* (1869), *6 Abb. Pr. N. S. 128.*

The existence in the neighborhood of an epidemic, contagious disease likely to produce death, or circumstance likely to result in serious bodily harm excuses the performance of a contract. *Libby v. Douglas* (1900), *175 Mass. 128.*

If full performance or acceptance be an express condition precedent to payment, the English courts deny a recovery where the subject matter is destroyed without the fault of either party to the contract. *Appleby v. Myers* (1867), *L. R. 2 C. P. 651.* If, however, the defendant has rendered services and the subject matter is accidentally destroyed without either party being in fault, the plaintiff cannot recover any payments he may have made. *Anglo-Egyptian Navigation Co. v. Rennie* (1875), *L. R. 10 C. P. 271.* That is to say, the loss is left where it falls.

A pro rata recovery has been permitted where the contract was not performed owing to the impossibility of detecting latent defects in the materials furnished. *Gove & Co. (1890) v. Island City Mercantile Co., 19 Oregon, 363.*

SECTION V.

BY OPERATION OF LAW.

The term "discharge by operation of law" means the manner in which a party to a contract acquires a release from his obligation without any act of his own but by the involuntary application of a rule of law.

(a) Merger.

1. Merger is the extinguishment of a security for a debt by the acceptance of a higher security; such as a bond in place of a note, or a deed in place of a simple contract. The acceptance of the higher security for the latter merges the latter in the former by operation of law.

(b) Alteration of a written instrument.

1. The rule applying to the alteration of a written instrument is that if a material alteration be made by a party to a deed or written contract without the consent of the other party, the instrument is discharged.¹

(c) Bankruptcy.

1. When a bankrupt obtains from the court an order of discharge, he is released according to the statute from the debts and liabilities he has contracted since the passing of the statute.²

CASES.

SECTION V.—DISCHARGE BY OPERATION OF LAW.

Merger.

CLIFTON *v.* JACKSON IRON CO.

74 MICHIGAN, 183.—1889.

Trespass. Defendant brings error.

CAMPBELL, J. Plaintiff sued defendant for trespass in cutting his timber in the winter of 1885-6. The defense set up was that the timber, though on the plaintiff's land, belonged to defendant. This claim was based on the fact that on September 22, 1877, a little more than eight years before the trespass, defendant made a contract to sell the land trespassed on to plaintiff, but with this reservation:

¹ *Wood v. Steele*, 6 Wall. (U. S.) 80.

² *Sturgis v. Crowninshield*, 4 Wheat. (U. S.) 122.

“Reserving to itself, its assigns and corporate successors, the ownership of pine, butternut, hemlock, beech, maple, birch, iron-wood, or other timber suitable for sawing into lumber, or for making into fire-wood or charcoal, now on said tract of land, and also the right to cut and remove any or all of said timber, at its option, at any time within ten years from and after the date of these presents.”

There were some unimportant provisions, also, not now material. Plaintiff showed that on November 4, 1885, the defendant conveyed to him the land in question by full warranty deed, and with no exceptions or reservations whatever. The testimony of defendant's agents, who cut the land, tended to prove that when the cutting was done the defendant's manager did not dispute plaintiff's title, but gave the agent to understand that it belonged to plaintiff, but that some arrangement would be made about it; that plaintiff was then absent, and there was no conversation with him or his wife on the subject. The bill of exceptions certifies that no other evidence was given concerning the right to cut timber. Upon these facts the court held that the deed conveyed the right in the timber to plaintiff, and that he owned it.

Had no deed been made, it is agreed that the reservation would have prevailed. But a previous contract cannot contradict or control the operation of a deed. It was competent for defendant to relinquish any contract reservation, and a deed which grants and warrants without any reservation has that effect. We do not hold that if the deed were so made by some mistake within the cognizance of equity the mistake might not be corrected. Neither need we consider whether, after such a deed, there might not be such dealings as to render such timber-cutting lawful, by license, express or implied. In this case there was no testimony tending to show that the deed was not supposed and intended to close up all the rights of the parties.

The judgment must be affirmed.

Contracts with the State.

FLETCHER *v.* PECK.

6 CRANCH (U. S.), 87.—1810.

Action on covenants in a deed from Peck to Fletcher. Judgment for defendant. Plaintiff brings error.

The State of Georgia, in 1795, granted, by an act of the legislature, a certain tract of land in that State to “The Georgia Com-

pany," for which a patent was regularly issued. Peck was a grantee by mesne conveyances of a portion of the tract. In 1803 he conveyed fifteen thousand acres of his holding to Fletcher, covenanting that the title given by the State of Georgia had been legally conveyed to him, and that this title had been "in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the said State of Georgia." There had in fact been an act passed by the legislature of Georgia in 1796 annulling the grant to "The Georgia Company," on the ground, as alleged, that the grant had been obtained by corrupt means. The question raised by the pleadings was whether this repealing act constituted a breach of the above covenant.

MR. CHIEF JUSTICE MARSHALL. The Constitution of the United States declares that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

Does the case now under consideration come within this prohibitory section of the Constitution?

In considering this very interesting question we immediately ask ourselves, what is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, and the obligation of which still continues, and since the Constitution uses the general term "contract," without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of

executing their contracts by conveyance. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected.

If, under a fair construction of the Constitution, grants are comprehended under the term "contracts," is a grant from the State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the State are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the State are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State.

No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both. In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the State may enter?

The state legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some

previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public uses, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient ground for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

The argument in favor of presuming an intention to except a case, not excepted by the words of the Constitution, is susceptible of some illustration from a principle originally ingrafted in that instrument, though no longer a part of it. The Constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual States. A State, then, which violated its own contract, was suable in the courts of the United States for that violation. Would it have been a defense in such a suit to say that the State had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defense would be set up. And yet, if a State is neither restrained by the general principles of our political institutions, nor by the words of the Constitution, from impairing the obligation of its own contracts, such a defense would be a valid one. This feature is no longer found in the Constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

In overruling the demurrer to the third plea, therefore, there is no error.

* * * * *

Judgment affirmed with costs.³

³ The charter granted by a State to a corporation is a contract, the obligation of which cannot be impaired without violating the Constitution of

LORD *et al.* v. THOMAS.

64 NEW YORK, 107.—1876.

Action to have chap. 323, Laws of 1874, declared unconstitutional and void so far as it authorized defendant, as superintending builder of the State Reformatory at Elmira, appointed under said act, to relet a contract for the brick and stone work of said building, and to restrain defendant from entering into any such new contract. Judgment for defendant, affirmed at General Term. Plaintiffs appeal. Plaintiffs were the assignees of a contract, authorized by a previous law, for the construction of such brick and stone work.

ANDREWS, J. This action cannot be maintained.

The State cannot be compelled to proceed with the erection of a public building, or the prosecution of a public work at the instance of a contractor with whom the State has entered into a contract for the erection of a building or the performance of the work. The State stands, in this respect, in the same position as an individual, and may at any time abandon an enterprise which it has undertaken, and refuse to allow the contractor to proceed, or it may assume the control and do the work embraced in the contract, by its own immediate servants and agents, or enter into a new contract for its performance by other persons, without reference to the contract previously made, and although there has been no default on the part of the contractor. The State in the case supposed would violate the contract, but the obligation of the contract would not be impaired by the refusal of the State to perform it. The original party would have a just claim against the State for

the United States. *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518 (1819). But the reservation by the State of a right to alter, amend, or repeal the charter is effective. *Miller v. The State*, 15 Wall. 478 (1872). See Stimson's Am. St. Law, § 8003.

The grant of an exclusive franchise is a contract, the obligation of which cannot be impaired. *The Binghamton Bridge*, 3 Wall. 51 (1865); *New Orleans Gas. Co. v. Louisiana Light Co.*, 115 U. S. 650 (1885).

The grant of an exemption from taxation, if upon a sufficient consideration, is a contract, the obligation of which cannot be impaired. *State of New Jersey v. Wilson*, 7 Cranch, 164 (1812); *Given v. Wright*, 117 U. S. 648 (1886). *Providence Bank v. Billings*, 4 Pet. 514 (1830); *Delaware Railroad Tax*, 18 Wall. 206 (1873).

any damages sustained by him from the breach of the contract, and although the claim could not be enforced through an action at law, the remedy by appeal to the legislature is open to him, which can, and it must be presumed will, do whatever justice may require in the premises. This remedy is the only one provided in such a case, and this is known to the party contracting with the State and the courts cannot say that it is not certain, reasonable, and adequate. See *Coster v. Mayor &c.*, 43 N. Y. 408.

If the court should undertake by its order or judgment to protect the contractor in the possession of the building or premises to enable him to proceed with the work under his contract, he would still be left without remedy to obtain payment except through an appropriation by the legislature. A law of the State suspending or discontinuing a public work, or providing for its performance by different agencies from those theretofore employed is not, therefore, subject to any constitutional objection because the change would involve a breach of contract with a contractor with whom it had entered into a contract for doing it. That a person who has employed another to perform labor may refuse to allow the other party to proceed, and that the latter cannot thereafter insist upon specifically performing the contract, was decided in *Clark v. Marsiglia*, 1 Den. 317.

* * * * *

The judgment of the General Term should be affirmed. All concur.

Judgment affirmed.

ENGINEERING CASES: EXCERPTS FROM DECISIONS.

STATUTE OF LIMITATIONS.

Neither the State nor the United States is barred by the statute of limitations unless it is expressly so stated in the statute. *Jefferson City v. Whipple*, 71 Mo. 519 (1880).

The government may plead the statute when sued by its subjects. 13 Amer. & Eng. Ency. Law, 716.

It is established in courts of equity that a fraudulent concealment of the cause of action by the contractor, such as poor workmanship or materials, will prevent him from relying upon the statute of limitations.

tection of the statute of limitations as long as the owner is ignorant of the facts. The time will begin to run in favor of the contractor when the fraud is discovered or might have been discovered by exercise of reasonable diligence. *Kirby v. Lake Shore etc. R.*, 120 U. S. 130; *Amy v. Watertown*, 130 U. S. 320.

GLOSSARY

Ab initio (From the beginning). In the inception; as to all the acts done; before.

Ad infinitum (To infinity). Indefinitely; endlessly.

A fortiori. For a stronger reason. A term used in logic to denote an argument to the effect that because one ascertained fact exists, therefore another, which is included in it, or analogous to it, and which is less improbable, unusual, or surprising, must also exist.

Aggregatio mentium (Meeting of minds). Consensus of opinion.

Aliud est tacere, aliud celare. It is one thing to be silent, another thing to conceal.

Ambiguitas latens (Hidden duplicity or indistinctness). Uncertainty of meaning arising from some collateral circumstance in a case where the instrument itself is sufficiently intelligible.

Ambiguitas patens (Obvious indistinctness). Uncertainty of meaning which appears upon the face of an instrument.

Ante. Before.

Assumpsit (He has undertaken). An undertaking, express or implied, to perform a parol agreement.

Bona fide. In good faith.

Bonus (Good). A premium; not a gratuity but given in consideration of extraordinary service.

Caveat emptor. Let the purchaser beware.

Certiorari (To be certified). A writ issued by a court to an inferior court of record requiring it to send in some proceedings therein pending or the records in some cause already terminated.

Cestui que trust. He for whose benefit another is possessed of lands or tenements or personal property.

De bene esse (Formally; conditionally). Applicable to acts deemed for the time to be well done or until avoidance; provisionally.

De novo (Anew). See *Venire facias de novo*.

Dictum (Thing said). An incidental opinion expressed by a court but lacking the force of an adjudication.

Donatio causa mortis. A gift made in prospect of death.

Dum sola. While a woman is unmarried.

Eo instanti. At that instant; immediately.

Et al. Abbreviation of *et alius* (and another), or *et alii* (and others).

Et seq. Abbreviation of *et sequentes* or *et sequentia* (and the following).

Ex aequo et bono. In justice and good dealing.

Ex delicto (From the crime). Actions arising in consequence of crime, misdemeanor or tort.

Ex dolo malo non oritur actio. A right of action cannot arise out of fraud.

Ex post facto. From an after act.

Expressum facit cessare tacitum. That which is expressed puts an end to that which is implied.

Ex turpi causa non oritur actio. No action arises out of an immoral consideration.

Feme covert. A married woman.

Foro conscientia. See *in foro conscientia*.

Ibid, ibidem, idem. The same.

Indebitatus assumpsit (Being indebted he undertook or promised). A writ in pleading.

In foro conscientia (Before the tribunal of conscience). Applicable to moral obligations as distinct from legal obligations.

Infra. Under; beneath.

In limine. In or at the beginning.

In pais. Taking place without legal formality or proceeding.

In pari delicto. In equal fault.

In personam. A designation of proceedings against the person distinguished from those against specific things (*in rem*).

In presenti. At the present time as opposed to *in futuro*.

In re. In the matter. Used in titles of cases to designate proceedings in bankruptcy or insolvency.

In rem. A designation of proceedings against specific things as distinguished from those against persons (*in personam*).

In statu quo. In the same situation as.

Inter partes in pari delicto potior est conditio defendentis. Where both parties are equally guilty the condition of the defendant is preferable.

In toto. In the whole; completely.

Lex fori (The law of the forum). The law of the country to which a court belongs.

Locus penitentia (Place of repentance). The opportunity of withdrawing from a contract before being finally bound; or of abandoning the intention of committing a crime before its completion.

Ne exeat (Let him not go out). A writ issued to prevent debtors from escaping from their creditors.

Nisi (*Nisi prius*, unless before). A term used to denote those courts in which trial by jury is held.

Non assumpsit (He did not undertake). A plea of the defendant that he did not make the promise alleged.

Non compos mentis (Not sound of mind). A term including idiocy, sickness, lunacy and drunkenness.

Nudum pactum (A bare contract). A contract without consideration.

Obiter dictum (A saying beside). See *dictum*.

Onus (Burden). Generally meaning the burden of proof.

Pari ratione (In an equal manner; in the same way). For the like reason; by like mode of reasoning.

Particeps criminis. Partner in crime.

Pendente lite (Litigation continuing). Pending continuance of an action.

Per annum. By the year.

Per curiam (By the court). A phrase distinguishing the decision of the court from that of a single judge.

Per minas. By threats.

Per se. In itself; taken alone.

Possit. He is able.

Potior conditio defendantis. Preferable is the situation of the defendant.

Prima facie. At first view; on the face of it.

Princeps criminis. The principal in crime.

Pro tanto. For so much.

Quantum meruit. As much as he has deserved.

Quasi (As if, almost). Indicates a resemblance between two objects really different.

Quid pro quo (What for what). Denotes the consideration of a contract.

Quoad hoc. With respect to this.

Quocunque modo. In whatever way.

Quocunque modo possit. In whatever way he can.

Quocunque modo velit. In whatever way he wishes.

Reductio ad absurdum (Reduction to absurdity). In logic, the method of disproving an argument by showing that it leads to absurd consequences.

Replevin. A form of action which lies to regain possession of personal chattels taken unlawfully from the plaintiff.

Res gestæ (Things done). Transaction; the subject-matter.

Res integra (Entire thing). A term applied to undecided points of law untouched by dictum or decision.

Retorno habendo. A writ to compel the return of property to the party to whom it is adjudged to belong.

Semble (It seems). Said of a point of law not directly settled but about which the court have expressed an opinion.

Stare decisis (To abide by decided cases). It is a general maxim that a point settled by decision forms a precedent not to be departed from.

Statu quo. See *in statu quo*.

Suppressio veri (Concealment of truth). Generally concealment of truth when a party is bound to disclose it voids a contract.

Supra. Above.

Trouver (To find). A form of action to recover damages against one who wrongfully has appropriated goods or personal chattels.

Ubi supra. Where above.

Ultra vires (Beyond powers). The technical designation, in the law of corporations, of acts beyond the scope of their powers.

Velit quocunque modo. See *quocunque modo velit*.

Venire facias de novo; venire de novo (That you cause to come afresh).

A new writ awarded when a defect in the first trial has caused the verdict to become void.

Versus. Against.

Via. A way; by way of.

Vigilantibus et non dormientibus jura subveniunt. The laws serve the vigilant, not those who sleep.

Vi majore. By greater strength.

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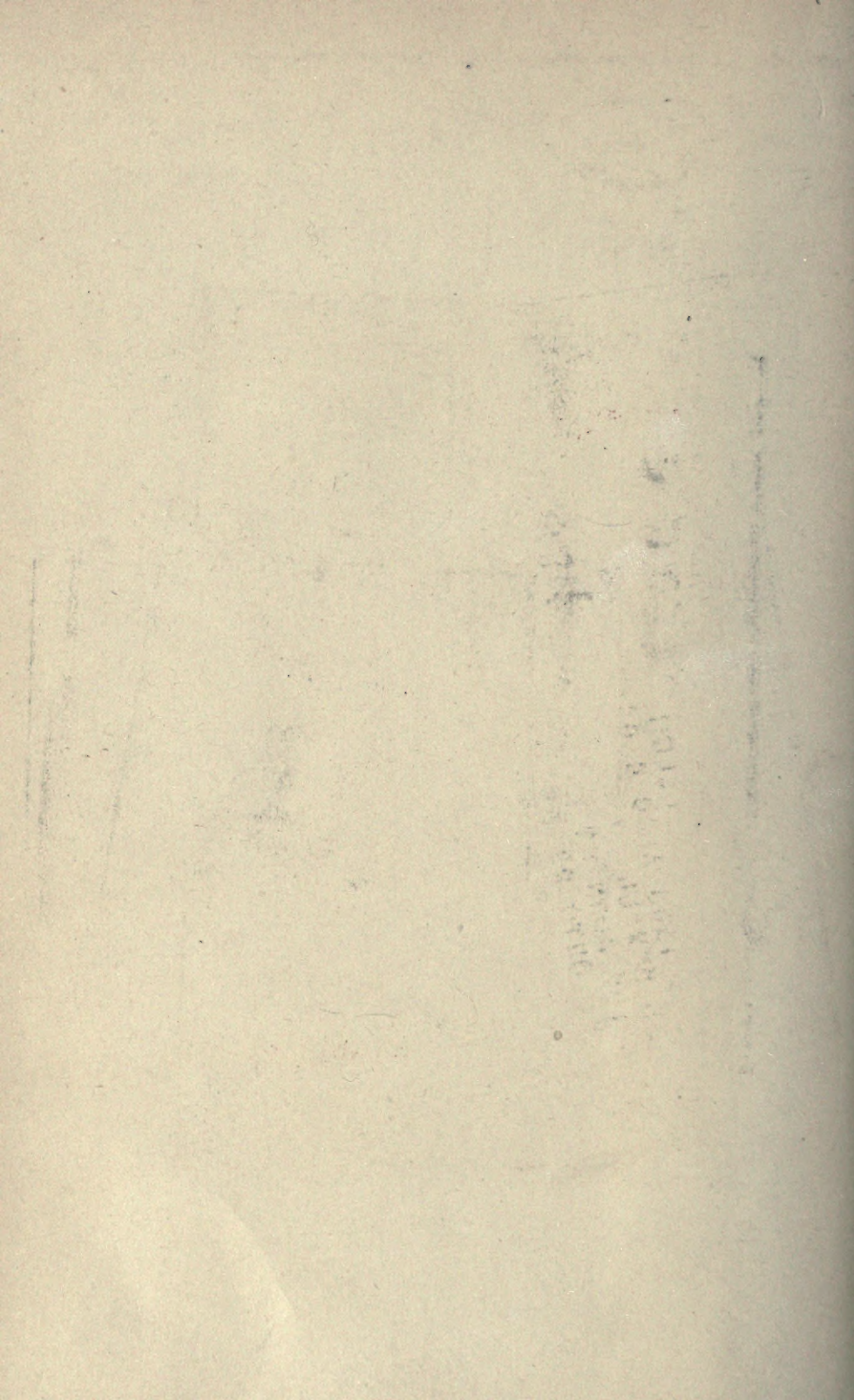
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